2015[5] to the controversial awarding of the 2022 World Cup to Qatar due to its troubling human rights record,[6] UEFA and FIFA have been under ever-increasing scrutiny due to their allegedly monopolistic control over "the world's game."

This conflict recently came to a head when the ESL, a consortium of twelve of the biggest commercial names in European club football, announced their collective creation of a new "league" in April 2021, which was clearly designed to rival UEFA's Champions League tournament, long considered the pinnacle of the sport in Europe as far as club competitions go.[7] Though the project quickly collapsed due to a combination of player, state, and fan pressure, UEFA itself took swift and strict action to oppose the project as well, announcing it would sanction both players and clubs that participated in the ESL from competing in any other UEFA-sponsored competition; perhaps most notably, UEFA noted it would potentially bar participating players from representing their national teams, excluding them from other prestigious competitions organized by UEFA like the quadrennial European Championship ("the Euros").[8] Despite the pushback from the vast majority of stakeholders in European football, three clubs (Barcelona and Real Madrid of Spain, and Juventus of Italy) have held out hope of reviving the ESL and sued UEFA and FIFA for allegedly anti-competitive behavior;[9] UEFA has countered that the ESL clubs themselves comprise a "cabal" or cartel that would be guilty of anti-

[5] *Fifa Corruption Crisis: Key Questions Answered*, BBC (Dec. 21, 2015), https://www.bbc.com/news/world-europe-32897066.
[6] Philip Buckingham, *This is Why the World Cup 2022 in Qatar is Controversial*, THE ATHLETIC (Mar. 31, 2022), https://theathletic.com/3219102/2022/03/31/why-world-cup-2022-qatar-controversial/.
[7] *See* Walker, *supra* note 2.
[8] Dwayne Bach, *The Super League and Its Related Issues Under EU Competition Law*, KLUWER COMPETITION LAW BLOG (Apr. 22, 2021), http://competitionlawblog.kluwercompetitionlaw.com/2021/04/22/the-super-league-and-its-related-issues-under-eu-competition-law/.
[9] Case C-333/21, Request for a preliminary ruling from the Juzgado de lo Mercantil n. 17 de Madrid (Spain) lodged on 27 May 2021 – European Super League v. UEFA and FIFA, Sept. 20, 2021, 2021 OJ (C382) 64 [hereinafter *ESL v. UEFA*].

competitive behavior itself due to the lack of the prospect of relegation for the majority of its clubs, which is a defining characteristic of the Champions League and the pyramidal "European model of sport," particularly in football, more broadly.

This paper will discuss how European competition law and sporting law developed to reach this point and propose a resolution, at least as far as the instant case of *ESL v. UEFA*, as well as discuss its implications for sport more broadly. In Part II, I will trace the history of European competition and sporting law, through both the Treaties and ECJ case law, and their eventual inevitable collision. In Part III, I will analyze the instant case of *ESL v. UEFA* more closely and argue against the application of the "sporting exception," which is the theoretical carveout for sporting regulators and organizers from normal European Union law due to the unique characteristics of sport, to European competition law. In Part IV, I will address the policy implications of such an outcome and briefly address the Advocate General's opinion in the case, which was released recently on December 15, 2022.

II. EU COMPETITION AND SPORTS LAW BACKGROUND

a. Foundations of EU Competition, or Antitrust, Law

i. Treaty Language

European Union competition law, or "antitrust" law as it is known in the United States, is driven and governed by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU); Article 106 TFEU is another relevant provision but, as will be shown, is likely of less importance in the sporting context.

1. Article 101 TFEU – Associations and "Cartels"

Article 101 of the TFEU primarily concerns cartels, or "associations of undertakings," acting in a concerted manner to distort the market.[10] Article 101(1) prohibits, in relevant part, "all agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition."[11] There are certain exceptions, however, provided for in Article 101(3), which can allow such agreements to remain lawful. For example, "any decision or category of decisions by associations of undertakings . . . which *contributes to improving the production or distribution of goods* or to *promoting technical or economic progress*, while allowing consumers a fair share of the resulting benefit," may be considered lawful, so long as they are limited to measures "which are not indispensable to the attainment of these objectives" and, importantly, "*afford such undertakings the possibility of eliminating competition* in respect of a substantial part of the products in question."[12] This effectively sets up a three-part test to analyze the illegality of such collective action: (1) Is there an agreement (or "concerted [practice]") between "undertakings," (2) with an "object or effect" of distorting competition in the EU market, and (3) whether any of the exceptions in Article 101(3) apply.[13]

For the purposes of the first part of this test, it has been held that the term "undertaking" is interpreted as broadly as meaning any entity engaged in economic activity; individual sports clubs are considered "undertakings" themselves, and sports associations, such as national

[10] Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Mar. 30, 2010, 2010 O.J. (C83) 53 [hereinafter TFEU]; *see also* Oliver Budzinski, *The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets*, 17 ILMENAU ECONOMICS DISCUSSION PAPERS 70, 3 (2012), https://www.econstor.eu/bitstream/10419/55859/1/686190246.pdf.
[11] TFEU art. 101(1).
[12] TFEU art. 101(3) (emphasis added).
[13] *See* TFEU art. 101.

football associations ("FAs") and international associations, such as UEFA and FIFA, may be considered both "undertakings" and "associations of undertakings" within the context of the competition articles.[14] It is also important to note for the second part of this test that so long as the agreement has the "object" of restricting competition, this is sufficient to prove its illegality; an "effect" on competition or consumers may, but need not, be proven.[15] However, it has since been held in the sporting context that, where a rule adopted by such an undertaking or association of undertakings "form[s] the basis of a legitimate sporting objective, a rule pursuing that objective is not in breach of EC competition law provided that restrictions contained in the rule are inherent in the pursuit of that objective and proportionate to it."[16] It has been argued that this "legitimate objective" rule has, in effect, replaced the "purely sporting interest" exception previously put forward by the ECJ and various sports associations;[17] this tension will be discussed further in the following sections.

2. Article 102 TFEU – Monopolies and "Dominance"

While Article 101 TFEU addresses, in effect, collusion between two or more "undertakings," Article 102 TFEU is concerned with the behavior of independent dominant undertakings, or "monopolies" as they are commonly referred to in the United States. Article 102 states, in relevant part, that "[a]ny abuse by one or more undertakings of a dominant position . . . shall be prohibited . . . in so far as it may affect trade between Member States."[18] This provision primarily applies to "companies able to act independently of, and with a degree of immunity

[14] *See* R. C. R. SIEKMANN, INTRODUCTION TO INTERNATIONAL AND EUROPEAN SPORTS LAW 101-02 (2012).
[15] TFEU art. 101(1); *see also* RICHARD PARRISH & SAMULI MIETTINEN, THE SPORTING EXCEPTION IN EUROPEAN UNION LAW 119 (2008); AttVe, *Cartels*, YOUTUBE (May 31, 2021), https://www.youtube.com/watch?v=gsJZ2MKZ1QY.
[16] SIEKMANN, *supra* note 14, at 87-88.
[17] *See id.* at 51.
[18] TFEU art. 102.

from, normal competitive market conditions," prohibiting practices that harm both consumers or competitors.[19] This has effectively set up another test, this time with four principle parts: (1) an undertaking must again be involved, which (2) "must hold a dominant position on a relevant market," and (3) "the conduct at issue must qualify as an abuse and restrict competition," which (4) affects trade between the Member States.[20]

It is important to note here that "[h]olding or acquiring a dominant position is not in itself unlawful under EU competition law;"[21] however, "dominant firms have '. . . a special responsibility not to allow [their] conduct to impair genuine undistorted competition on the common market.'"[22] Article 102 contains an inexhaustive list of actions that may constitute such abuses, such as "directly or indirectly imposing unfair purchase or selling prices," or "limiting production, markets or technical development to the prejudice of consumers."[23] The relevant market analysis is also important to determine dominance, but there is a presumption of dominance when an undertaking has attained over 50% of the relevant market share.[24] Even proponents of the "sporting exception" acknowledge that sporting associations are likely to fall under the ambit of Article 102 due to their monopolistic control over the sport under the pyramidal European model.[25]

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[19] Lisa Kaltenbrunner, *European Union: Abuse of Dominance and Article 102 of the TFEU*, GLOBAL COMPETITION REVIEW (June 24, 2022), https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-abuse-of-dominance-and-article-102-of-the-tfeu.
[20] Thomas Graf & Henry Mostyn, *The Dominance and Monopolies Review: European Union*, THE LAW REVIEWS (July 14, 2022), https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/european-union; TFEU art. 102.
[21] Graf & Mostyn, *supra* note 20.
[22] PARRISH & MIETTINEN, *supra* note 15, at 126 (quoting Case 322/81, Michelin v. Comm'n, ECLI:EU:C:1983:313, para. 57).
[23] TFEU art. 102(a)-(b); Parrish & Miettinen, *supra* note 15, at 125.
[24] PARRISH & MIETTINEN, *supra* note 15, at 125.
[25] PARRISH & MIETTINEN, *supra* note 15, at 126 ("Sports governing bodies tend by even the most permissive definitions constitute dominant undertakings where they engage in economic activity.").

3. Article 106 TFEU – Services of General Economic Interest

Article 106(1) concerns, effectively, state-sanctioned monopolies, and states that those "undertakings to which Member States grant special or exclusive rights"[26] are "equally bound to the Treaty, in particular the [Article 18 TFEU] prohibition on nationality discrimination and competition law."[27] Article 106(2) goes on to discuss "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly," and states that such undertakings are also subject to the competition provisions of the Treaties "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[28] It has been argued that sports associations meet this criteria of "services of general economic interest" (SGEIs), however "[t]his argument has not been forcefully promoted by the sports governing bodies themselves."[29] Since the affixation of such a label to an undertaking by a Member State is likely to come with significant strings attached in the form of oversight and regulation, "[t]his type of intervention runs counter to sports governing bodies' pleas for greater autonomy and self-regulation." This concept of oversight of sports associations through legislation will be revisited later, but since this concept was not brought up and Article 106 was not mentioned in the reference questions to the ECJ in the European Super League case, it will not be addressed in detail here as a judicial matter.[30]

ii. Case Law

While the above Articles constitute primary law that governs competition law and policy in the European Union, there is also a great deal of case law on these subjects as well. For

[26] TFEU art. 106(1).
[27] PARRISH & MIETTINEN, *supra* note 15, at 132.
[28] TFEU art. 106(2).
[29] PARRISH & MIETTINEN, *supra* note 15, at 133.
[30] *See ESL v. UEFA*.

example, the relevant market analysis in a given dispute, or analysis of whether an action by an undertaking constitutes an "abuse" under Article 102 TFEU, continues to serve as fodder for the courts.[31] It has generally been held that "[a] 'dominant position' under [Article 102 TFEU] concerns 'a position of economic strength . . . which enables it to prevent effective competition . . . by giving it the power to behave to an appreciable extent independently of its competitors, its customers, and, ultimately, consumers.'"[32] However, given the specificity of the case-by-case approach taken by the courts and the ECJ in particular regarding disputes in competition law, much of the analysis of the application of competition law to sporting contexts will be discussed in the following sections. It will be briefly noted here that the competition provisions of the Treaties have been described as "a cornerstone of the activities of the EU,"[33] and in *Eco Swiss*, the ECJ held that these provisions are of a "fundamental" nature,[34] and as such allow for the setting aside of arbitration awards, such as those issued by the Court of Arbitration for Sport, when they infringe competition law.[35]

[31] *See* Graf & Mostyn, *supra* note 20.
[32] STEPHEN WEATHERILL, *Article 82 EC and Sporting 'Conflict of Interest': The Judgment in MOTOE*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 471, 474-75 (2014) (citing Case 27/76, United Brands v. Comm'n, ECLI:EU:C:1978:22 (Feb. 14, 1978); Case 85/76, Hoffmann-La Roche v. Comm'n, ECLI:EU:C:1979:36 (Feb. 13, 1979); and Case 322/81, Michelin v. Comm'n, ECLI:EU:C:1983:313 (Nov. 9, 1983)).
[33] STEPHEN WEATHERILL, *The Sale of Rights to Broadcast Sporting Events Under EC Law*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 311, 325 (2014).
[34] *See* Case C-126/97, Eco Swiss Chine Time v. Benetton Int'l, ECLI:EU:C:1999:269 (June 1, 1999).
[35] *See* Cambridge Law Faculty, *'Saving Football from Itself: Why and How to Re-make EU Sports Law': 2022 Mackenzie-Stuart Lecture*, YOUTUBE (Mar. 9, 2022), https://youtu.be/MQDosIav9GE (lecture delivered by Professor Stephen Weatherill and discussing *Eco Swiss* at 20:52).

b. History of EU Sporting Law

i. Treaty Language

Sport was not mentioned in the EU treaties until 2009, when the Lisbon Treaty added what is now, most relevantly, Article 165 TFEU, which states, in relevant part: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."[36] Thus, up until this point, sport policy in the EU was driven not by "primary or secondary legislation but rather case law. In short, the defining characteristic of EU sports policy is the construction of a discrete area of EU sports law."[37] As for Article 165's mandate for EU action in the sporting arena, Professor Stephen Weatherill argues "The Court of Justice [of the European Union] has been doing that for a very long time. That's no more than a codification of the Court's approach in the interpretation and application of EU free movement law and competition law to sport."[38] Thus, the impact of Article 165 on sports policy in Europe "is both profound and trivial,"[39] and without significant enabling legislation at the EU level, ECJ case law continues to be the main arena in which disputes over whether and how other elements of EU law, such as competition law, are played out, as will be discussed below.

ii. Case Law

The history of ECJ case law on sporting matters is generally one in which sport has been gradually "reined in" under the auspices of EU law and the Treaties, and involved "[t]he progressive curtailment of the notion of a 'sporting exception' and the expansion of Treaty

[36] TFEU art. 165(1).
[37] RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 2 (2003).
[38] Cambridge Law Faculty, *supra* note 35.
[39] STEPHEN WEATHERILL, *EU Sports Law: The Effect of the Lisbon Treaty*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 507, 507 (2014).

scrutiny to non-discriminatory restrictions."[40] Professor Weatherill has described the ECJ as "relatively intolerant of sporting autonomy," and that "sporting bodies within the European Union must comply with free movement law, competition law, nondiscrimination rules . . . and probably other horizontally applicable fundamental rights."[41] This section will address how the ECJ reached this point, in particular as it relates to the issue of focus here of the conflict between competition and sporting law.[42]

- *Walrave and Koch* (1974) and *Donà v. Mantero* (1976)

Walrave and Koch was one of the first ECJ decisions pertaining to a sporting matter, which was a dispute between two pacemakers for a cycling team who alleged they were subjected to nationality discrimination by the defendant cycling association.[43] The ECJ stated that the prohibition of discrimination on the basis of nationality contained within the Treaties "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services."[44] In this, the ECJ held that in so far as sport constitutes "economic activity," such as employment, sport can be held subject to the Treaties.[45] However, the ECJ in *Walrave* also opened the door to what has since been argued is the "sporting exception" when it stated that rules of "*purely sporting interest* and as such [have] nothing to do with economic activity" are not subject to at least the prohibition of discrimination on the basis of nationality.[46] The ECJ

[40] PARRISH & MIETTINEN, *supra* note 15, at 73.
[41] Cambridge Law Faculty, *supra* note 35 (at 21:50).
[42] For a more thorough and extensive tracing of the history of EU sport case law and the rise and fall of the "sporting exception," see generally Chapter 4 of PARRISH & MIETTINEN, *supra* note 15.
[43] Case 36-74, B. N. O. Walrave v. Association Union Cyclist Internationale, ECLI:EU:C:1974:140 (Dec. 12, 1974) [hereinafter *Walrave*].
[44] *Id.* at para. 17.
[45] *Id.* at para. 4.
[46] *Id.* at para. 8 (emphasis added); PARRISH & MIETTINEN, *supra* note 15, at 73-74.

gave the specific, but arguably not exhaustive, example of national sports teams,[47] such as those that compete in the Euros (organized by UEFA) and the World Cup (organized by FIFA).

Shortly after it decided *Walrave*, the ECJ was presented with a similar reference question, this time coming directly from the world of football in *Donà v. Mantero*.[48] The Court effectively reiterated its previous reasoning, citing *Walrave*, but again holding that "rules [which] exclude foreign players from participation in *certain matches* for reasons which are not of an economic nature . . . and are thus *of sporting interest only*" may be permissible under the Treaties.[49] A narrow reading of these cases together would suggest a limited exception, in practice, only for national sports teams; however, the ECJ would not more conclusively shut the door on a broader reading until 1995 in *Bosman*.[50]

- *Bosman* (1995)

In *Bosman*, the Court addressed a dispute arising out of a system of mandatory transfer fees and nationality quotas in club football teams.[51] The Court held that both of these rules ran afoul of the EU free movement provisions, finding that collective employer-to-employer agreements that had *effects* on employees were impermissible under the Treaties.[52] Importantly, the Court also moved away from the "purely sporting" exception outlined previously and towards a "justification" analysis, whereby such offending rules could be justified "if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of

[47] *Walrave* para. 8.
[48] Case 13-76, Donà v. Mantero, ECLI:EU:C:1976:115 (Jul. 14, 1976) [hereinafter *Donà*].
[49] *Donà* para. 17-19 (emphasis added).
[50] *See* PARRISH & MIETTINEN, *supra* note 15, at 87-89.
[51] Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v. Bosman, ECLI:EU:C:1995:463 (Dec. 15, 1995) [hereinafter *Bosman*].
[52] *Id.* at para. 138.

public interest," which was a relatively new characterization at the time.[53] Notably, however, *Bosman*, as well as *Walrave* and *Donà* before it, deal exclusively with the free movement and nationality discrimination provisions of the Treaties; it would be some time before the Court extended its interpretation of European competition law to the sporting context, even explicitly declining to do so in *Bosman*.[54]

c. The Intersection of EU Competition and Sport Law

European competition law, as outlined in the Treaties principally through Articles 101 and 102 TFEU, and sport law, as outlined largely by the ECJ's case law, eventually reached their inevitable collision in 2006, when the ECJ decided *Meca-Medina*.[55]

- *Meca-Medina* (2006)

Meca-Medina was the first case the ECJ ever decided based on what are now Articles 101 and 102 TFEU in the sporting context.[56] The case involved a complaint by two swimmers protesting an anti-doping rule adopted by swimming's governing body, which they were found to have violated.[57] Here, the Court definitively held that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[58] While the Court went on to eventually dismiss the swimmers' specific claims and effectively uphold the anti-doping

[53] *Id.* at para. 104; PARRISH & MIETTINEN, *supra* note 15, at 88-89 (citing *Bosman* and STEPHEN WEATHERILL, *'Fair Play Please!': Recent Developments in the Application of EC Law to Sport*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 201 (2014)).
[54] *Bosman* para. 138.
[55] Case C-519/04 P, Meca-Medina v. Comm'n, ECLI:EU:C:2006:492 (Jul. 18, 2006) [hereinafter *Meca-Medina*].
[56] *See* SIEKMANN, *supra* note 14, at 85.
[57] STEPHEN WEATHERILL, *Anti-Doping Rules and EC Law*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 283, 284 (2014) (citing *Meca-Medina*).
[58] *Meca-Medina* at para. 27.

limits set by the swimming organizers,[59] the decision has been characterized as "striking a final blow against the notion of a broader sporting exception from the application of EC law."[60] As Professor Siekmann described, "[i]t was argued by some that so-called 'purely sporting rules' automatically fall outside the scope of EC anti-trust rules and cannot, by definition, be in breach of those provisions. The ECJ has unequivocally rejected this approach in [*Meca-Medina*]."[61] However, as indicated by the ECJ's ruling in favor of the swimming organizers on the specific rules in question in *Meca-Medina*, the ECJ clarified that potentially anticompetitive action by such associations are not, on their face, in violation of competition law. The ECJ again here, as in many other areas of its jurisprudence, invokes the context and proportionality of the action in question: "Where these features form the basis of a legitimate sporting objective, a rule pursuing that objective is not in breach of EC competition law provided that restrictions contained in the rule are inherent in the pursuit of that objective and are proportionate to it."[62]

- *MOTOE* (2008)

MOTOE was another seminal case in the ECJ's jurisprudence of applying EU competition law to sports regulators, this time ruling on the powers of a sports governing body to authorize third-party competitions.[63] The dispute involved MOTOE, a Greek motorcycling nonprofit, which sought authorization from the Greek state to organize motorcycling

[59] *Id.* at paras. 40-56.
[60] PARRISH & MIETTINEN, *supra* note 15, at 96 (citing STEPHEN WEATHERILL, *Anti-Doping Revisited: The Demise of the Rule of 'Purely Sporting Interest'?*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 379 (2014)).
[61] SIEKMANN, *supra* note 14, at 86.
[62] *Id.* at 87-88.
[63] Case C-49/07, Motosykletistiki Omospondia Ellado NPID (MOTOE) v. Elliniko Dimosio (Greece), ECLI:EU:C:2008:376 (Jul. 1, 2008) [hereinafter *MOTOE*]; *see also* STEPHEN WEATHERILL, *Article 82 EC and Sporting 'Conflict of Interest': The Judgment in MOTOE*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 471 (2014).

competitions, but this authorization was denied on the basis of a Greek statute that required the consent of the International Motorcycling Federation before granting such a license, which was not given in this case.[64] The Court found that the "relevant market" for the analysis of the International Motorcycling Federation (in this case, a regional affiliate in Greece, but functionally an agent of the international federation) was the market for the "organisation of motorcycling events plus their commercial exploitation by means of sponsorship, advertising and insurance contracts."[65] In its ruling, the Court held that what is now Article 102 TFEU precludes such a national statute that confers on an undertaking, like the sports governing body here, "the power to give consent to applications for authorisation to organise [sport] events, *without that power being made subject to restrictions, obligations, and review*."[66] While the case dealt with specifically *state-conferred* power under Treaties and an affirmative grant, covered by what is now Article 106 TFEU, the Court's reasoning as far as the gatekeeping powers that can or ought to be held by sports regulators is illuminating. It has been suggested that the "conflict of interest" sports governing bodies that are also organizers of events face "lies at the heart of the Court's disapproval" in *MOTOE*.[67]

III. THE ESL CASE – CONTROVERSY AND PROPOSED RESOLUTION

a. Background of the Controversy – *ESL v. UEFA*

As has been previewed, *ESL v. UEFA* involves a dispute primarily between UEFA, the "nonprofit" governing body for the sport of football in Europe and the confederation of the national football associations of 55 European countries, and a coalition of some of the largest

[64] *See MOTOE* at paras. 4-12 (emphasis added); WEATHERILL, *supra* note 63, at 472-73.
[65] WEATHERILL, *supra* note 63, at 474-75 (citing *MOTOE* at para. 33).
[66] *MOTOE* para. 48 (emphasis added).
[67] WEATHERILL, *supra* note 63, at 477.

individual commercial clubs in Europe.[68] While there is some debate over whether all twelve of the original proposed "founding members" of the league are still contractually obliged to support the project, the main clubs continuing to drive the litigation are Barcelona and Real Madrid of Spain and Juventus of Italy.[69] The Super League clubs sought to form a "breakaway" competition that would most directly compete with UEFA's flagship offering, the "Champions League" competition, which is comprised primarily of the top finishers in each national league's season—an increasingly consistent group, but not necessarily the same group that would be afforded relegation-free status from the Super League based on the varied success and performance of those founding clubs in recent years.[70]

UEFA and its member associations responded by previewing sanctions on any club that would participate in the proposed Super League, banning those clubs from participating in other "domestic, European or world" competitions and floating the potential exclusion of the clubs' players from representing their national teams in European or global competitions, like the Euros (organized by UEFA) and the World Cup (organized by FIFA).[71] There may be some ostensibly legitimate motivations behind UEFA's threatened sanctions, such as sporting considerations regarding consistency of technology and rule application[72] or player safety reasons deriving from management of the match calendar.[73] However, the federations-as-competition-organizers have

[68] *See* Walker, *supra* note 2.
[69] Philip Buckingham, *Explained: The Binding Contract That Means All Six English Clubs Are Still Part of the Super League*, THE ATHLETIC (Apr. 18, 2022), https://theathletic.com/3253386/2022/04/18/explained-the-binding-contract-that-means-all-six-english-clubs-are-still-part-of-the-super-league/.
[70] *See* Luke Bosher, *How Super League Teams Have Performed in European Competition*, THE ATHLETIC (Apr. 19, 2021), https://theathletic.com/news/european-super-league-clubs-teams/qqMVCmtsh3b7/.
[71] *See* Bach, *supra* note 8.
[72] *See* Kate Burlaga, *The New Rule and Law Changes for This Season's Champion's Leauge*, THE ATHLETIC (Aug. 25, 2022), https://theathletic.com/3530588/2022/08/25/uefa-champions-league-rules-world-cup/.
[73] *See* Matt Slater, *Was the Super League Illegal? Why UEFA Is in Court with Barcelona, Juventus and Real Madrid*, THE ATHLETIC (Sept. 29, 2021), https://theathletic.com/2832247/2021/09/29/was-the-super-league-

often been the culprits driving increases in fixture congestion and player overload[74] while the clubs have previously called for greater rest periods,[75] and a total ban on clubs and their employee-players seems disproportionate to a problem that cross-competition dialogue and coordination could theoretically solve as well. While there are cases, like *Meca-Medina*, where such legitimate sporting interests and their proportionate protections may be upheld, here it is simply impossible to unravel UEFA's vested interest in maintaining the economic appeal and commercial viability of its flagship club football competition as unique offerings from the wildly disproportionate sanction regime it announced when a competitor attempted to enter the market.

b. Legal Arguments and Analysis

Simply applying the legal analysis provided under EU competition law in Articles 101 and 102 TFEU show that UEFA and its member associations clearly engaged in an unlawful restriction of competition. It will be advocated here that sporting regulatory and organizing entities, such as FIFA, UEFA, and their member associations, should not be entitled to a "sporting exception" from European competition law as regards the organizing and authorization of competitions, as such monopolistic privilege does not serve to benefit competition or the

illegal-why-uefa-is-in-court-with-barcelona-juventus-and-real-madrid/ ("[I]nternational federations like UEFA are allowed to regulate their sports, free from government interference, but there are limits to their monopoly power. For example, they should be allowed to control their sport's calendar to ensure money trickles down the pyramid and players are not burned out.").

[74] *See, e.g.*, Matias Grez, *Footballers Are Playing an 'Obscene' Amount of Games. Will a World Cup Every Two Years Make It Worse?*, CNN (Oct. 7, 2021), https://www.cnn.com/2021/10/07/football/footballer-burnout-biennial-world-cup-spt-intl/index.html; Ashling O'Connor, *UEFA Moves to Reduce Resting Time for International Players*, THE SUNDAY TIMES (Oct. 6, 2011), https://www.thetimes.co.uk/article/uefa-moves-to-reduce-resting-time-for-international-players-t65h0mcbffd; *World Cup and Club World Cup Expansion Shows 'Complete Disregard' for Leagues by FIFA, Says LaLiga*, SKYSPORTS (Mar. 15, 2023), https://www.skysports.com/football/news/12098/12834380/world-cup-and-club-world-cup-expansion-shows-complete-disregard-for-leagues-by-fifa-says-laliga.

[75] *See, e.g.*, *Europe's Top Clubs Call for Fewer Games and Speedier FFP Cases*, ESPN (Mar. 27, 2018), https://www.espn.com/soccer/blog-uefa/story/3432894/europes-top-clubs-call-for-fewer-games-and-speedier-ffp-cases.

product (sporting competitions and, more broadly, "entertainment" for fans) and would dangerously allow for the exploitation of the sport's customers,[76] the fans, and its employees, the athletes.

i. Article 101 TFEU and Meca-Medina

Applying the three-part test under Article 101 TFEU, viewing the affiliation of national member associations under UEFA as an "agreement between undertakings," it is clear that such united action consists of an inexcusable agreement under the Treaties. First, it is well established that the national associations themselves constitute "undertakings" through their economic activity, such as "commercially exploiting a sport event."[77] There was also a clear "agreement" between these undertakings in the form of a joint statement and action taken to issue sanctions on the Super League clubs and players.[78] Second, the "object" of this agreement was clearly to "distort," as in quash, competition, such as the alternative offering of a Super League tournament that could compete for participating clubs, ticket-buying fans, and media broadcasting rights. UEFA president Aleksander Ceferin has publicly stated that the message intended behind the sanctions was to make the breakaway clubs "realise their mistake and suffer the appropriate consequences."[79] As has been noted, simply having such an exclusionist aim is sufficient under the "object" arm of the provision, but the further result of the ESL effectively collapsing at least

[76] *See* European Commission, 23 July 2003, Case 37.398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25.
[77] SIEKMANN, *supra* note 14, at 101-02.
[78] *E.g.*, Bach, *supra* note 8 (citing *Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A*, UEFA (Apr. 18, 2021), https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/0268-12121411400e-7897186e699a-1000--joint-statement-on-super-league/).
[79] Ed Aarons, *'Suffer Consequences': UEFA to Discuss Punishments for Super League Rebels*, THE GUARDIAN (Apr. 22, 2021), https://www.theguardian.com/football/2021/apr/22/suffer-consequences-uefa-to-discuss-punishments-for-super-league-rebels.

in part because of the threat of sanctions could potentially reach the "effect" arm as well.[80] Thirdly, it is argued here that there is no legitimate justification for such action under the *Meca-Medina* test. It is commonly accepted that *Meca-Medina* stands for the proposition that a potentially anticompetitive rule under the Treaties may be justified if it pursues "a legitimate objective, [is] inherent to these objectives, [and is] necessary and proportionate."[81] The objective publicly offered here is that "UEFA and other federations argue that they intend to preserve the principles of open competitions and sporting merit."[82] It has also been argued that "[t]he organisational level of sport in Europe is characterised by a monopolistic *pyramid structure*,"[83] which may constitute such a legitimate objective.[84] However, while it has been repeatedly argued that such a "European model of sport" must be protected,[85] there are no similar rules that apply to clubs or athletes that compete in other competitions around the world that are not similarly marked by such a pyramidal structure. For example, there is no ban on players who have previously competed in Major League Soccer in the United States, which is not based on a pyramidal promotion and relegation system, from joining European football clubs and participating in competition at the Member State, European, and global levels. Further, in a direct comparison to the *Meca-Medina* case, which ruled on this principle in favor of the sporting regulators, a clear distinction on the facts can be drawn. In *Meca-Medina*, the ECJ held that "even if the anti-doping rules at issue are to be regarded as a decision of an association of

[80] *See* TFEU art. 101(1); *see also*, *e.g.*, PARRISH & MIETTINEN, *supra* note 15, at 119; Walker, *supra* note 2.
[81] *E.g.*, Bach, *supra* note 8 (citing *Meca-Medina*).
[82] *Id*.
[83] SIEKMANN, *supra* note 14, at 86.
[84] *See* PARRISH & MIETTINEN, *supra* note 15, at 124-25; Bach, *supra* note 8; STEPHEN WEATHERILL, *The White Paper on Sport as an Exercise in 'Better Regulation'*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 425, 435 (2014).
[85] *See*, *e.g.*, PARRISH & MIETTINEN, *supra* note 15, at 17-19.

undertakings . . . , they do not . . . necessarily constitute a restriction of competition incompatible with the common market, within the meaning of [Article 101 TFEU], since they are justified by a legitimate objective."[86] The legitimate objective for the anti-doping rules there was found to be "the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."[87] Here, however, the true objective of UEFA's and its member associations' actions in sanctioning the breakaway clubs is likely to be driven more by UEFA's economic interest in maintaining its exclusive holding of organization and broadcasting rights for European football competitions such as the Champions League, and the attention and prestige the member associations receive via their representative clubs in those cups through the national competition-based access scheme currently employed.[88] The European General Court held, in a case now being appealed to the ECJ as well, that a similar move by the International Skating Union in sanctioning athletes participating in breakaway competitions was unlawful under the Treaties, as they were "disproportionate" and "hinder[ed] the development of alternative and innovative speed skating competitions."[89] (The ECJ heard the arguments in the *ISU* case right before *ESL v. UEFA*, and decisions on both are expected in 2023).[90] While the outcome of this appeal remains to be seen, it is not unreasonable to contrast the objectives

[86] *Meca-Medina* at para. 45.
[87] *Id*. at para. 43.
[88] Dale Johnson, *Which Premier League Clubs Will Qualify for the Champions League, Europa League and Europa Conference League?*, ESPN (May 19, 2022), https://www.espn.com/soccer/english-premier-league/story/4645413/which-premier-league-clubs-will-qualify-for-the-champions-leagueeuropa-league-and-europa-conference-league.
[89] Bach, *supra* note 8 (citing Case T-93/18, Int'l Skating Union v. Comm'n, ECLI:EU:T:2020:610 (Dec. 16, 2020) [hereinafter *ISU*]).
[90] Christian Ritz, Dennis Cukurov, & Frederik Junker, *Sport Meets Antitrust: Should Monopolistic Structures in European Sports Be Questioned?*, HOGAN LOVELLS (Aug. 17, 2022), https://www.engage.hoganlovells.com/knowledgeservices/news/sport-meets-antitrust-should-monopolistic-structures-in-european-sports-be-questioned.

pursued in the various allegedly anti-competitive rules at issue in *Meca-Medina* and *ESL v. UEFA*, respectively.

ii. Article 102 TFEU and MOTOE

Under Article 102 TFEU's test, it again appears clear that if UEFA were viewed as an individual undertaking itself, it could reasonably be found to have abused its dominant position through its unilateral actions as well. First, as has been established by case law, sports governing bodies constitute "undertakings" themselves through their participation in "economic activity."[91] Next, in defining the "relevant market" as the market for "European football," or even "European club football" more specifically, it appears fairly clear that UEFA holds a "dominant position."[92] UEFA is the sole organizer of the Champions League, the most prestigious European club football competition reserved for the top performers in national leagues (for example, the top four teams in the English Premier League each season gain automatic bids in the following season's tournament), as well as the secondary Europa League competition generally open to the teams that finish just below the Champions League participants (fifth and sixth place in the Premier League last season), and even the recently-launched Europa *Conference* League, aimed at providing European competition for teams finishing even below the Champions and Europa League participants (seventh place in the Premier League last year).[93] Third, it also appears clear that UEFA engaged in an abuse of that dominance by moving to hinder the ESL, an ostensible competitor, from getting off the ground.[94] This could reasonably be considered an impermissible "exclusionary abuse" under the Treaties and case law.[95] And fourth, the impact on the internal

[91] *See*, *e.g.*, *Walrave*.
[92] *See*, *e.g.*, Graf & Mostyn, *supra* note 20.
[93] *See* Johnson, *supra* note 88.
[94] *See*, *e.g.*, Graf & Mostyn, *supra* note 20 (citing *Hoffman-La Roche*).
[95] *See*, *e.g.*, *id*.

market is clear given the economic impacts of clubs incorporated throughout the Member States. In sum, these provisions on their own suggest that the position UEFA took in moving to quash the ESL constituted an inexcusable abuse under Article 102 TFEU. Further, when comparing the most relevant case law at hand, *MOTOE* appears to offer a clear precedent for the ECJ's treatment of such monopolistic sports governing bodies. Even though the dispute in *MOTOE* involved a Member State statute affirmatively granting such monopolistic privilege to the regional affiliate of the international governing body, the "conflict of interest" that has been described as one of the driving principles of the ECJ's decision in that case is still at play in *ESL v. UEFA*.[96] While the Court in *MOTOE* did not foreclose the possibility of any "gatekeeping" function of sports regulators, one can see a link between the reasoning in *MOTOE* and *Meca-Medina* whereby the wielding of this gatekeeping function should be limited to such "legitimate interests" articulated in *Meca-Medina*, such as the health and integrity of the athletes. As articulated, a "pyramidal structure" is not likely to reach this point, as sport and athletes are seen to be sufficiently protected by non-pyramidal schemes the world over.[97] UEFA is clearly motivated by both its interests as the sport's governing body in the region, but also its economic interests in protecting the revenue it, as an undertaking itself, receives from the organization and broadcast of its own tournaments that the ESL would compete against in the market.[98]

iii. Summary and Implications for Article 165 TFEU

While the ECJ's case law is undoubtedly one of increasing scrutiny of sport under European law and the Treaties, including competition law, Professor Weatherill has noted that there is generally "some room for manoeuvre for sports bodies wishing jealously to cling on to

[96] *See* WEATHERILL, *supra* note 63, at 477.
[97] *See supra* Part 3(b)(i).
[98] *See*, *e.g.*, Graf & Mostyn, *supra* note 20.

the bundle of regulatory and commercial functions they typically discharge" in the decisions:[99] "*MOTOE*, as a ruling requiring adaptation in but not abandonment of established patterns of sports governance, stands with other judgments concerning sport . . . In *Bosman* the whole notion of a transfer system was not ruled incompatible with EC law, only *that* transfer system was condemned."[100] More specifically and relevantly, he notes that "[t]here is not necessarily an objection *per se* to the 'pyramid' system of governance which is common in sport" in the *MOTOE* decision, which may be found most relevant to the case at hand in *ESL v. UEFA*. However, it is difficult to see a "middle ground" in the instant case where UEFA and the member associations are found *not* to have violated competition law under either Articles 101 or 102 TFEU, but that also leaves the door open to authorized third-party competitions that may meaningfully rival UEFA's offerings. Article 165 TFEU may be offered as one way of advancing an objective of protecting the "specific nature of sport," potentially including the pyramidal structure.[101] However, as has been shown, the pyramidal structure is not "inherent"[102] in sport or football, as evidenced by UEFA's openness to players coming from non-pyramidal leagues, and FIFA's oversight of those non-pyramidal football associations and leagues the world over as well. Further, there is plentiful room for protection of specific sporting interests, such as the inherent collusion between two firms necessary to simply put on a sporting match, which is unique to sport.[103] Customers—the fans—pay to see a match between two clubs; rare is

[99] WEATHERILL, *supra* note 63, at 477.
[100] *Id*.; *see also* Cambridge Law Faculty, *supra* note 35.
[101] TFEU art. 165(1).
[102] *Meca-Medina* at para. 42; *see also*, *e.g.*, PARRISH & MIETTINEN, *supra* note 15, at 101.
[103] PARRISH & MIETTINEN, *supra* note 15, at 2 ("[S]porting competition cannot take place unilaterally. It requires the participants or the league to co-ordinate activity over such issues as setting fixtures and establishing the rules of the game. Whilst these forms of co-ordinated activity are not commonly permitted in other industries, it is eminently reasonable to allow for limited cartelisation in sport.").

the athlete that would be content with training for no eventual competition, and rarer still is the individual that would regularly pay to see an individual or team simply train. In this sense, "there is no harm to competition from the co-ordination among the member teams when those teams are not economic competitors in a relevant market."[104]

IV. CONCLUSION

a. Policy Benefits of the Denial of the "Sporting Exception" in European Competition Law

Policy motivations may also be seen to motivate such a finding as outlined above. For example, sport, and football in particular, has grown significantly in popularity and impact over the past century, and along with "the emergence of new media platforms, governing bodies have also become significant economic actors."[105] As a result of the decreasingly "amateur" nature of the sport, the motivations behind maintaining a rigid pyramidal structure may be seen as simultaneously decreasingly driven by sports governance interests and increasingly driven by the governing bodies' economic interests. European football has thus widely moved beyond a "localized" market for the sport itself, and increasingly into the wider "entertainment" market, competing with other leagues, sports, and forms of entertainment for our time through increasingly differentiated media channels.[106] It has been argued that "sports with multipole governing bodies lose public interest as the public prefer to associate with one national and international competition rather than competing competitions."[107] However, governing bodies

[104] *Id.* at 3 (quoting M. Flynn & R. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 ECONOMIC JOURNAL F45 (2001)). Allowance of such "collusion" could also be seen as easily falling under the ambit of the exception outlined in Article 101(3) TFEU, discussed *supra* Part 2(a)(i)(1).
[105] PARRISH & MIETTINEN, *supra* note 15, at 20.
[106] *See id*.
[107] *Id.* at 19.

like UEFA and FIFA are also themselves criticized, for example, for their lack of stakeholder representation at key decision-making levels, such as the denial of meaningful fan and player input.[108] Allowing for breakaway leagues under competition law would, ostensibly, provide more choice to these stakeholders, resulting in a better product at the end of the day under the theory of free market competition. If consumers—the fans—do not want that choice, they can act accordingly on the market, as they did in mobilizing to protest the ESL clubs in England,[109] or in the legislature, which together constitute their only present avenues for participation and influence on decision-making in sport as it stands, without meaningful fan representation in most clubs and football associations at the national and European levels. European competition law, through the ECJ's decision in this case, should not be seen as foreclosing these methods of participation and market choice for consumers (fans), workers (the athletes), and market participants (the clubs).

The point of this paper is also not to endorse the breakaway of rival football competitions or leagues as the optimal or even a marginally beneficial solution to the problems arising out of the monopolistic control of sports regulating bodies as sole competition organizers. On the one hand, it has been demonstrated that UEFA has achieved a form of "regulatory capture" over the European Union, whereby the EU has effectively outsourced its regulatory powers in the realm of football to UEFA and defers to its self-regulation on many important matters.[110] On the other, it is clear from the popular reaction to the ESL's announcement that a rival competition is not

[108] *See, e.g.*, *id*.
[109] Ed Aarons, *English Fans' Mobilization in Contrast to Resignation in Europe*, THE GUARDIAN (Apr. 24, 2021), https://www.theguardian.com/football/2021/apr/24/spain-italy-england-fans-chelsea-european-super-league-esl.
[110] Henk Erik Meier et al., *The Capture of EU Football Regulation by the Football Governing Bodies*, 2022 J. COMMON MKT. STUD. 1 (2022).

desirable by the market, at least in the form proposed by the ESL.[111] Commentators have long called for increased EU regulation of sport through legislation which, while not without complications, would provide a clearer path forward on a wide range of present and future conflicts.[112] Clearer and potentially more stringent guidance and regulation by the EU could serve the dual function of (1) preserving the status quo pyramidal system favored by fans, evidenced by their market preferences as voiced through the protests to the ESL, while (2) imposing greater oversight and good governance requirements with meaningful avenues for fan and other stakeholder participation through the political process, all of which are currently absent from the current regime due to the unregulated monopolistic control of the sport governing bodies. There is already some momentum for such government oversight in the UK,[113] though it remains to be seen whether such an ambitious proposal can and will be taken up at the European level.

b. AG Opinion Update: December 15, 2022

The Advocate General's opinion in this case, released on December 15, 2022, will also be briefly addressed here. The AG issued an opinion principally siding with UEFA, arguing that while the Super League was not barred from setting up a rival tournament by law, the Court also could not compel UEFA and FIFA to allow those clubs to continue participating in events

[111] *See, e.g.*, Aarons, *supra* note 109;
[112] *See, e.g.*, Joseph Weiler et al., *Only the EU Can Save Football from Itself*, EURONEWS (Nov. 12, 2021), https://www.euronews.com/2021/11/12/only-the-eu-can-save-football-from-itself-view; Stephen Weatherill, *Saving Football from Itself: Why and How to Re-make EU Sports Law*, CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES FIRSTVIEW 1 (2022), https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/saving-football-from-itself-why-and-how-to-remake-eu-sports-law/8E4E3D97D906BC19B4E694292C592FC3.
[113] Philip Buckingham, *Explained: What the Government White Paper Means for the Regulation of English Football*, THE ATHLETIC (Feb. 24, 2023), https://theathletic.com/4245991/2023/02/24/explained-white-paper-regulation-epl-efl/.

organized by the sport's governing bodies without their consent.[114] In the opinion, AG Rantos argued that "Article 165 TFEU gives expression . . . to the 'constitutional' recognition of the 'European Sports Model', which . . . is based, first, on *a pyramid structure*," deriving from "a series of initiatives which had been taken by the EU institutions, from the 1990s onwards," that took such a position.[115] However, it has also been argued that the language of Article 165 was left intentionally vague, not detailing a specific model of sport that it was enshrining, so as to form a "cautiously drawn formula . . . designed to reassure those who fear the rise of the EU as a sports regulator."[116] While this can be viewed either way, potentially as a perceived "deference to the value of sites for the regulation of sport other than the EU in general,"[117] it could also be seen as leaving the door open to stricter competition enforcement in sport, which could also be construed as removing the EU from playing favorites and picking which competitions or governing bodies to authorize. While prior writings such as the European Commission's 2007 White Paper on Sport undoubtedly provided "institutional momentum" for the Article,[118] the text was left vague enough to leave room for interpretation in its application to competition law in the instant case.

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[114] *See* Samuel Petrequin, *EU Legal Adviser Sides with UEFA, FIFA in Super League Case*, ASSOCIATED PRESS (Dec. 15, 2022), https://apnews.com/article/world-cup-sports-soccer-luxembourg-real-madrid-0c3b870569f2483f7efbbeca8be34f3a (discussing Case C-333/21, European Superleague Company v. UEFA, Opinion of Advocate General Rantos, ECLI:EU:C:2022:993 (Dec. 15, 2022) [hereinafter *ESL AG Opinion*]).
[115] *ESL AG Opinion* paras. 29-30.
[116] STEPHEN WEATHERILL, *EU Sports Law: The Effect of the Lisbon Treaty*, *in* EUROPEAN SPORTS LAW: COLLECTED PAPERS 507, 519 (2014).
[117] *Id*.
[118] *See generally id*.

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June 10, 2023

The Honorable Beth Robinson
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Dear Judge Robinson,

I am a rising third-year student at the University of California, Berkeley, School of Law, and I am writing to apply for a 2024-25 clerkship position in your chambers and any positions thereafter. I am inspried by your career and your commitment to marriage equality, and it would be an honor to work as a clerk in your chambers. Additionally, I am from New England, and I would love the opportunity to return to the area.

I believe I could contribute meaningfully to your chambers for two reasons. First, I have an exceptionally strong work ethic and legal skillset, as reflected in my earning a Berkeley Law Dean's Fellowship grant and my obtaining 1L and 2L academic distinctions in the top 10% and 15% of my class, respectively. And second, I genuinely love legal research and writing. In my twenties congenital hip problems gave way to daily pain. Recreating as a runner and a mountaineer could no longer give me the sense of challenge, play, and growth that they had before and that I value. And so I looked for new types of challenges, eventually finding my answer in legal work. I am happy losing myself in a new legal question—researching cases, comparing facts, honing my reasoning and communication, and advocating for others. The joy I find in these tasks is one that helps me overcome my pain on a daily basis and one around which I have intentionally and gratefully built my life. It fueled my decision to become a lawyer after six years in another career, it fuels my success in law school, and it fuels my decision to pursue a clerkship now.

I am also pursuing a clerkship in your chambers because I believe the experience would help me achieve my longer-term goals. Prior to law school I worked in data analytics and engineering at Capital One and at HireVue, where data models automate life-changing financial and hiring decisions, respectively. As a lawyer I hope to spend my career tackling the legal and ethical questions raised by these types of products. To do so, I know that I will need the ability to analyze and communicate complex issues of law such as those reviewed by the Second Circuit and your chambers.

Please let me know if I can provide any additional information. Thank you very much for considering my application.

Respectfully,

Kate Bulger

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EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
Candidate for J.D., May 2024
Honors: 1L Academic Distinction (Top 10%), 2L Academic Distinction (Top 15%), Dean's Fellowship Scholarship (merit-based tuition award)
Research: Research assistant to Professor Andrea Roth and Professor Sean Farhang
Researcher for the Student Borrower Protection Center: Kate Bulger and Doug Lewis, Comment Letter on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21) (Dec. 20, 2021)
Activities: *Berkeley Technology Law Journal*, Student Publications Editor

Duke University, Durham, NC
B.S., *cum laude*, in Economics, Concentration in Finance, May 2015
Research: Research assistant to the Economics Department and the Nicholas School of the Environment
Activities: Medellín mi hogar, Documentary filmmaking with refugees in Medellín, Colombia
Duke Center for Race Relations, Diversity retreat curriculum revisor
Athletics: 2014 NYC Marathon, Top-100 US Female Finisher

EXPERIENCE

Quinn Emanuel, San Francisco, CA — May - Aug. 2023
Summer Associate, Litigation

California Department of Justice, San Francisco, CA — Jan. - May 2023
Intern, Consumer Protection Section – Privacy Unit
Researched and drafted notice letters, witness interview questions, investigatory memoranda, and consumer-facing educational material.

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Researched and wrote memoranda on autonomous vehicles, crypto markets, cyber security, fiduciary duty, the fair notice doctrine, reproductive rights, compassionate release, and habeas corpus petitions. Drafted client guidance regarding new US and EU privacy and fintech regulation and enforcement trends. Assessed legal risk for new machine learning projects.

Rain Intelligence, San Francisco, CA — Jan. - Apr. 2022
Part-Time Claim Evaluator
Evaluated patterns of consumer harm identified by Rain Intelligence software for their potential as class action suits. Drafted legal memoranda describing those potential suits to hand off to plaintiff-side firms. Edited peers' legal memoranda.

HireVue, Salt Lake City, UT
Business Intelligence Director, Manager, and Sr. Analyst — Apr. 2018 - June 2021
Built out and led the company's analytics function, which included redesigning and managing the data tech stack and database layers; guiding internal and external strategy decisions; developing adverse impact metrics to track the impact of HireVue's products on inclusive hiring; and hiring and developing the team's analyst and data engineering talent.

Capital One, McLean, VA
Sr. Business Analyst and Business Analyst — July 2015 - Nov. 2017
Informed and drove the decision to consolidate Capital One's mobile applications. Launched a suite of event-triggered mobile alerts. Created the first-ever diversity and inclusion curriculum for the Analyst Development Program.

Bank of America, New York, NY
Sales and Trading Summer Analyst — May - Aug. 2014
Developed a trade strategy for Venezuelan public and semi-public bonds. Analyzed the Puerto Rican bond market as the territory sought to create a judicial debt-relief process for public corporations.

INTERESTS

Ethical A.I., physical therapy (due to a chronic condition, I have had 5 hip surgeries—most recently in April 2023), climbing (or just being near) mountains, poetry, live music, playing with my cockapoo, and gardening.

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Joseph Santiesteban is a partner I worked with while a summer associate at Orrick, Herrington, & Sutcliffe in 2022.

Berkeley Law
University of California
Office of the Registrar

Katherine M Bulger
Student ID: 3036492360
Admit Term: 2021 Fall

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2023 Spr: Civ Field Placement Ethics Sem

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Sean Farhang	5.0	5.0	H
LAW	201	Torts Daniel Farber	4.0	4.0	H
LAW	202.1A	Legal Research and Writing Cheryl Berg Lucinda Sikes	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Glater	4.0	4.0	H

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Emily Berry	2.0	2.0	H
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	H
LAW	250	Business Associations Stavros Gkantinis	4.0	4.0	HH
LAW	252.21	Antitrust&Technology Platforms Christopher Hockett	1.0	1.0	CR
LAW	278.31	Copyright Law Pamela Samuelson	3.0	3.0	HH

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	30.0	30.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills 1 of 2 Writing Requirements** Emily Berry	3.0	3.0	H
LAW	226.9	State&Local Impct Lit Prac Sem **Units Count Toward Experiential Requirement** Erin Bernstein Jill Habig	2.0	2.0	HH
LAW	226.9A	State&Local Impact Lit Pract **Units Count Toward Experiential Requirement** Erin Bernstein Jill Habig	2.0	2.0	CR
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	H
LAW	241	Evidence Andrea Roth	4.0	4.0	H

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	45.0	45.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	223	Administrative Law Kenneth Bamberger	4.0	4.0	H
LAW	295	Civ Field Placement Ethics Sem **Fulfills Either Prof. Resp. or Experiential** Flora Pereira Susan Schechter Hans Moore	2.0	2.0	HH
LAW	295.1M	Berk Tech Law Journ Kathleen Vanden Heuvel	1.0	1.0	CR
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	6.0	6.0	CR
LAW	297	Self-Tutorial Sem Andrea Roth	2.0	2.0	CR

Carol Rachwald, Registrar

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Berkeley Law
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Katherine M Bulger
Student ID: 3036492360
Admit Term: 2021 Fall

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	60.0	60.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	220.9	First Amendment Erwin Chemerinsky	3.0	3.0	
LAW	227.11	Emp Arbitr:Law and Practice **Units Count Toward Experiential Requirement** Barry Winograd	2.0	2.0	
LAW	227.8	Supreme Court Sem **Fulfills 1 of 2 Writing Requirements** Amanda Tyler	3.0	3.0	
LAW	233	White Collar Crime **Units Count Toward Experiential Requirement** Amy Craig	2.0	2.0	
LAW	258	Estates and Trusts Kristen Holmquist	3.0	3.0	
LAW	262.53	Technology and Human Rights	1.0	1.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	60.0	60.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

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Erin Bernstein
California Office

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May 8, 2023

Re: Clerkship Recommendation for Kate Bulger

I am writing to highly recommend Kate Bulger for a judicial clerkship in your chambers. I am currently a founding partner at Bradley Bernstein Sands LLP, handling complex litigation cases for private and public entity clients. For more than a decade prior to this, I was a public sector attorney, leading the Oakland City Attorney's Community Lawyering and Civil Rights Unit and working on the San Francisco City Attorney's Complex and Affirmative Litigation Team on high-profile civil rights, constitutional, and politically sensitive litigation.

As one of Kate's professors and supervisors from the "State and Local Impact Litigation" seminar and practicum at Berkeley Law School, I have had the privilege of observing her growth and development as a legal professional. I have witnessed her legal and intellectual acumen, her boundless work ethic, and her superb research and writing skills. Simply put, Kate is a standout student, a sharp writer, and an insightful thinker. Kate was one of only 14 students accepted by application into my course—and was not only my top student within that select group, but one of the best students I've had the pleasure of supervising.

Kate's intellectual curiosity and critical thinking skills are truly exceptional. Throughout the practicum, Kate consistently displayed a deep understanding of complex legal concepts and played a vital role in classroom discussions. By asking insightful, well-timed questions or drawing exciting connections between readings and class comments, Kate pushed the whole class forward. She shared ideas openly, clearly, and without ego. And her contributions consistently impressed both me and her classmates. As someone who has worked in public service for nearly two decades, I recognize that Kate will be an outstanding lawyer.

Throughout the practicum, Kate also displayed a special willingness to offer help and to work hard. Kate was assigned with two other classmates to assist me in active litigation. Kate took the lead organizing the students' work, communicating updates clearly and proactively, and going above and beyond to ensure that projects were completed to the highest standard. Kate also organized opportunities for the team to celebrate their wins and connect on a personal level. Her work ethic is married with kindness, genuineness, and humor. It is a one-of-a-kind combination that any team or chambers would be lucky

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to have. In short, Kate is a dependable and generous co-worker who consistently offers a helping, hard-working hand.

Lastly, Kate demonstrates exceptional research, writing, and analytical skills. For her final project, Kate pitched a possible lawsuit to be brought by the California Attorney General's Office based on harm to platform-based drivers. In a state with unique statutory limitations on such actions, Kate pitched a novel and well-reasoned consumer protection-based solution. Her analysis combined deep research of the technical facts (including the thorny issue of algorithmic-based pay) with knowledge of complex legal principles and precedent, as well as the practical political fallout of her proposed litigation tactics. In her practicum work for me, Kate also demonstrated her ability to conduct complex legal research and analysis. She wrote clearly and persuasively on a range of topics including abstention, preemption, procedural vs. substantive protections, and consumer harm. In short, Kate handily mastered what she learned in class so that she could apply those lessons to real-world legal issues in a creative and effective manner. Her work demonstrates sound legal judgment, effective argument, and elegant writing.

Kate would be an excellent judicial clerk and a delight to have in your chambers. In closing, I would like to reiterate my strong support for Kate and give her my highest recommendation. I recommend her to you without reservation.

Sincerely,

Erin Bernstein
Lecturer, University of California, Berkeley, School of Law
Founder, Bradley Bernstein Sands LLP

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Oakland, California 94611
510-380-5801 | bradleybernstein.com

March 29, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend Kate Bulger for a clerkship in your chambers. I had the pleasure of teaching Kate in her first year Written and Oral Advocacy class in the spring of 2022, and in my Advanced Legal Writing class in the fall of 2022. Kate is a gifted writer and hard-working student who received an Honors grade in both classes.

Kate is a creative, curious, and analytical student. She takes the time to grapple with ideas and complicated material, and works hard to understand meaning beyond what is on the surface. For example, in her first assignment, Kate considered making a unique and novel argument in her brief. After spending time in office hours discussing the approach, she ultimately decided not to use the argument. But her creativity and engagement with the law demonstrated a maturity and intellect that separated her from her peers.

In her final assignment in the Advanced Legal Writing class, Kate wrote a brief addressing whether an English-only policy in the workplace violated Title VII of the Civil Rights Act. Kate's brief emphasized the facts most favorable to her side, neutralized her opponent's best facts, and brought in the most relevant caselaw for analogies. What set her brief apart from the other students' work was her ability to weave in a persuasive theme in the introduction, statement of facts, and argument sections of her brief. Kate meticulously edited her brief, and her final draft was free of spelling, grammar and other mistakes common in law student work. After two years of teaching Kate, I can tell you she takes her work seriously and strives for improvement on each assignment.

Kate is not only bright; she is ambitious and committed. From my first interaction with Kate during office hours, she spoke of her passion for privacy law and consumer protection. Last summer she worked in Orrick's Data and Privacy group, and she spent this spring externing for the California Attorney General's Consumer Protection Unit.

As a law student, Kate has taken advantage of every opportunity to hone her oral and written advocacy skills. Kate is the Senior Student Publications Editor for the Technology Law Journal. She is also an active participant in the State and Local Impact Litigation Practicum and in a Student Led Program focused on Consumer Protection. She has the distinction of being in the top 10 percent of her 1L class.

Kate is a well-respected member of her class and consistently treats fellow students and professors with respect. In everything Kate does, she shows remarkable dedication and commitment. Given what I know of Kate, her interactions with counsel, co-clerks, and court personnel alike would be uniformly professional and positive. And her sharp research and writing skills will ensure high-quality bench memos.

In sum, I am thrilled to support Kate in this process. Please feel free to contact me at (512) 557-4597 or eberry@berkeley.edu if you would like to further discuss Kate's qualifications.

Sincerely,

Emily Berry
Professor of Advanced Legal Writing
University of California, Berkeley School of Law

May 16, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend Katherine (Kate) Bulger for a clerkship in your chambers. Kate was an Honors student in my Fall 2022 Evidence class and was an excellent research assistant for me and a colleague on a complex empirical project. I highly recommend her for a clerkship.

Analytical and writing ability. Kate easily earned an Honors grade in my 108-person Evidence class, based on a notoriously difficult multiple choice exam and policy essay. What made her stand out was not so much her grade, but her class comments (she was a frequent and thoughtful contributor) and her interest in data science and AI, which we often discussed outside of class. She asked for supplemental reading on issues related to evidence law and machine-generated proof (an ongoing subject of my research), and her interest eventually caused her to inquire about being my research assistant. I was excited by the opportunity to work with her.

Given Kate's performance in Evidence, it doesn't surprise me that Kate has earned nothing but Honors and High Honors (top 10%) grades so far in law school, in both large doctrinal classes and smaller specialty courses.

Kate was a superb research assistant; one of the best I've had in recent memory. She gave me high level feedback, along the lines of a junior colleague, on a piece I submitted for publication on the right to counsel in "all criminal prosecutions" (as the 6th Amendment states, even though that is not how the right is enforced, even in a textualist age). She also analyzed state constitutional and colonial charter provisions around the time of the Founding on right to counsel. Most recently, she has coded scores of federal laws with imprisonment provisions, as part of a project I am conducting jointly with political scientist Sean Farhang on Congress and criminalization. Professor Farhang had Kate for civil procedure and already thought very highly of her (when I mentioned she was my RA, he was excited that we would get the benefit of her work on the project).

Kate showed a real joy and enthusiasm for the work; she was highly motivated, never complaining about doing work that was laborious but needed to be done (like a 50 state survey) but also reveling in the more intellectually challenging work (like giving high level substantive and stylistic feedback on a draft article). This was true even as she was in bed after yet another hip surgery (she has had 5); she said she liked the distraction.

In particular, she stood out on the empirical project for flagging a key issue on her own initiative: she noticed that some laws incorporated a criminalization provision by reference to another law, and figured out a list of key phrases that Congress uses when doing so. Based on Kate's work, we were able to create a template for finding other such provisions, ensuring that we had an accurate count of criminalization provisions over time.

Personality and work ethic. Kate is highly professional without being overly formal or awkward; she has great people skills and is pretty funny to boot. She's a "throw anything at me and I'll just put my head down and get it done, with a smile" sort of person. Of course, she's also an accomplished runner and mountaineering expert (!), and hopes to clerk in areas where she has access to outdoor sporting activities. She's a well adjusted, well rounded person who is also an academic superstar. The way she explained it to me, her experience with chronic pain has made her a more intentional person, working efficiently and deliberately.

Kate also cares about the impact of her work; she has shown a commitment to consumer protection issues since 1L year, and hopes to be a litigator. She will be a formidable one.

In sum, Kate would be an excellent federal clerk at any level. Please do not hesitate to contact me by cell phone, 202-669-6565, or e-mail, aroth@law.berkeley.edu, with any questions.

Very truly yours,

Andrea Roth
Professor of Law
UC Berkeley School of Law

May 16, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Application of Kate Bulger

Dear Judge Robinson:

I write to recommend with enthusiasm that you hire Ms. Bulger as your clerk. She is one of those rare law students who is not only among the top students in her class, racking up many honors grades in Berkeley law courses, but also a person with significant professional experience as a business analyst, as well as experience as a documentary filmmaker, a serious marathon runner, and a developer of a curriculum promoting racial diversity. She has, moreover, experience working on some of the most challenging technology law and policy issues of the day, having worked last summer on, among other things, autonomous vehicles, cryptomarkets, machine learning, cybersecurity, and privacy legal issues.

Ms. Bulger also has a clarity of vision about the focus on which she plans to devote the rest of her professional career. The country needs young lawyers committed to developing AI ethics, extending consumer protections to AI and other advanced technology products, and addressing other emerging technology policy issues. Because she wants to become a litigator, she would greatly benefit from a clerkship and she'd be highly motivated to give the clerkship her very best efforts.

As a student in my Copyright class in the spring of 2022, Ms. Bulger was one of the top 3 students and earned the high honors grade I gave her. I know she's a good analyst not only from her final exam, but also from the two short ungraded written assignments I give each year, so that I can see whether the students can apply copyright concepts in challenging cases. One of last spring's assignments was to consider the implications the Supreme Court's decision in the Georgia v. Public Resource.Org case for how the D.C. Circuit should decide the ASTM v. Public Resource.Org case. Both lawsuits challenged PRO's online posting of legal materials in which the plaintiffs claimed copyright. In Georgia, the Court held that the officially adopted annotations of the Georgia statute were government edicts, and hence ineligible for copyright protection, because of a Georgia Commission closely supervised the preparation of the annotations. This made the Commission (and hence the state) the "author" of the annotations. Relying on some late nineteenth century cases, the Court decided that the state's authorship of the annotations in the course of its official duties made them unprotectable by copyright law. The ASTM case is different in that ASTM is a private standard setting body. However, the codes that PRO published online had been adopted as "the law" of one or more federal, state, or local governments. The "authorship" rationale for the Georgia decision could not be the basis of a holding that the ASTM codes were "government edicts." But the Court in Georgia also said that "no one can own the law," so the assignment gave the students a chance to apply concepts in the Georgia decision to the facts of the ASTM case. Very few students were able to figure out that the simplest solution was to say that a document can become a government edict in one of two ways: first, if the document has the force of law, as ASTM codes do, or second, if a state entity prepares the document in the course of official duties, as in the Georgia case. Ms. Bulger "got it" and I was impressed.

I have no hesitation about giving Ms. Bulger a strong recommendation as your clerk.

Sincerely,

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School

Pamela Samuelson - psamuelson@berkeley.edu - 510-388-3337

KATE BULGER
617-999-5268 | kmbulger@berkeley.edu | San Francisco, CA

WRITING SAMPLE

This writing sample is based on a hypothetical fact pattern from a legal writing class at Berkeley Law School. The excerpt below reflects writing and editing that is entirely my own as well as high-level classroom discussion of the case from the course. Where indicated I have omitted portions of the memo for brevity.

Kate Bulger
University of California, Berkeley, School of Law
Berkeley, California 94720
Telephone: (617) 999-5268

Attorneys for Plaintiffs
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. SEAN MILLER, *et al.*, d/b/a BURGER STOP, Defendants.	Civil Action No. 22-3424

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

After twenty-five years of business, and employing primarily Navajo employees, the Defendants here, the Millers, now claim that a strict prohibition against speaking Navajo is essential to their fast-food business. The Millers developed an English-only policy ("the Policy") and fired four Navajo employees, Doris Begay, Suzanne Pierce, Loretta Nez, and Freda Locklear (the Plaintiffs), for disagreeing with it. Represented by the Equal Employment Opportunity Commission ("EEOC"), the Plaintiffs seek relief under Title VII of the Civil Rights Act for the Policy's discriminatory effects. Since the record establishes clear harm to Navajo employees while casting serious doubt on the movants' business necessity defenses, summary judgment should not be granted for the Defendants.

II. STATEMENT OF FACTS

For twenty-five years Sean, Sarah, and Brett Miller ("the Millers") have owned and operated a fast-food restaurant called Burger Stop bordering the Navajo Nation. Miller Decl. ¶¶ 1, 4. For over eighty years the Navajo people were subjected to abuse and cultural genocide. Diaz Decl. ¶ 4-5.The Millers are not Navajo, but over half of their customers and over ninety percent of their employees are. Pierce Decl. ¶¶ 3, 8. The Millers hire Navajo employees explicitly for their Navajo language skills. *Id.* Despite this, in August 2021 the Millers posted "Please, No Navajo" signs throughout the restaurant, kitchen, and breakroom. Miller Dep. 10.

The following month two Navajo employees made offensive comments in Navajo that concerned some employees and customers. Tsosie Decl. ¶ 4. The Millers report that during this time they were "losing a lot" of employees and customers. Miller Dep. 11. However, one employee reports that in her ten years working at Burger Stop she did "not witness[] coworkers using offensive Navajo language." Pierce Decl. ¶ 8. In late November Lily Hunt, a target of the

inappropriate comments, reported the behavior to Sean Miller who spoke with the two offenders. Hunt Dep. 3. After this, the comments stopped. *Id.* Yet two months later, the Millers implemented an English-only policy which punishes unintentional slips and applies to all conversations except those with non-English-speaking customers. Pierce Decl. ¶ 3. Violations can result in written warnings and loss of shift preferences. Miller Decl. ¶ 14.

According to the Millers, all Navajo employees at Burger Stop are fluent English speakers. Miller Decl. ¶ 6. But "[w]hat takes [some Navajo employees] once to explain in Navajo can take [them] two or three times as long as in English." Pierce Decl. ¶ 6. According to experts and Navajo employees, even fluent bilingual speakers cannot control accidental slips into an original or primary language. Diaz. Decl. ¶ 7. Meanwhile, the Millers themselves continue to use Polish in the restaurant. Pierce Decl. ¶ 8.

The Millers claim that successful operation of their business requires the Policy. Miller Decl. ¶ 10. Nearby, however, Taco Bell and McDonalds have majority Navajo employees and no English-only policies. Pierce Decl. ¶ 9. Managers at both report no problems caused by employees speaking Navajo. *Id.* Even the Millers admit that business has not improved since implementing the Policy. Miller Dep. 12. In fact, the Policy caused four employees, the Plaintiffs here, to quit. Pierce Decl. ¶ 7. And the Millers have been unable to replace them. Miller Dep. 12. As for Burger Stop's customers, they care most about getting good food quickly and as ordered. Miller Dep. 12. Lastly, the Millers, who do not speak Navajo, claim that the English-only policy is necessary for supervision. Miller Dep. 9. However, the Millers are present in Burger Stop only two of the restaurant's twelve operating hours. *Id.*

III. ARGUMENT

A. Legal Standard for Summary Judgment

[Omitted]

B. Summary judgment is inappropriate because a reasonable juror can find that the Policy causes disparate impact which business necessity fails to justify.

Title VII of the Civil Rights Act prohibits employment practices and policies that cause disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(k). Such harm is only permissible when the policy is essential to the business as determined through three burden-shifting steps. *Id.* First, to establish a prima facie case of disparate impact, the plaintiff must identify a specific, seemingly neutral employment practice or policy that has a significant adverse impact on a protected class of employees. *Id.* After that, the employer can justify the policy (and its harms) by proving that the policy effectively serves an essential business purpose. *Garcia v. Spun Steak Co.* ("*Spun Steak*"), 998 F.2d 1480, 1486 (9th Cir. 1993). Lastly, the plaintiff can still succeed by showing that an alternative, less discriminatory policy achieves the same business purpose(s). 42 U.S.C. § 2000e-2(k); *Gutierrez v. Mun. Court of Se. Judicial Dist.* ("*Gutierrez*"), 838 F.2d 1031, 1041 (9th Cir. 1988), vacated for mootness, *Gutierrez v. Mun. Court of Se. Judicial Dist.*, 873 F.2d 1342, 1343 (9th Cir. 1989).

Here, summary judgment should not be granted because a reasonable juror can find that the Policy causes disparate impact which business necessity fails to justify. *See Id.* at 1042; *Spun Steak*, 998 F.2d at 1486. The Defendants argue that every juror will find that their English-only policy, applying at all times and to unintentional slips, does not cause disparate impact to Navajo employees or that, if it does, the Policy is justified by the Millers' need to improve workplace harmony, customer relations, and supervision. A reasonable juror, however, can find otherwise: (1) the Policy restricts Navajo employees' privilege of speaking and creates a hostile work

environment, both causing disparate impact, and (2) each of the Defendants' proffered business justifications fails or is equally served by an alternative, less discriminatory policy.

1. A reasonable juror can find that the Plaintiffs have established a prima facie case of disparate impact because the Policy restricts Navajo employees' privilege of speaking and because it creates a hostile work environment.

A seemingly neutral policy establishes a prima facie case of disparate impact when it causes significant adverse effects on the terms, conditions, or privileges of employment of a protected group. *Id.* English-only policies are so commonly discriminatory that the EEOC and many courts presume significant adverse effects wherever such policies exist. *See e.g. Gutierrez*, 838 F.2d at 1044. When this presumption is not relied upon, an English-only policy causes significant adverse effects when it restricts the privilege to speak at work or creates a hostile work environment. *See id*. at 1487, 1489.

Here, a juror can find that the Policy causes Navajo employees both types of significant adverse effects and that a prima facie case of disparate impact exists. *See id*.

a. The Policy restricts Navajo employees' privilege of speaking because they cannot readily comply with the Policy.

An English-only workplace policy causes significant adverse impact to the privilege of speaking when the policy cannot be readily observed. *Spun Steak*, 998 F.2d at 1487-88. Employees with limited proficiency in English— "a question of fact for which summary judgment is improper"—cannot readily comply with any English-only policy. *Id.* at 1488. Multilingual employees cannot readily comply with English-only policies that are pervasive or strictly enforced against accidental slips. *Id*.

The Ninth Circuit held in *Spun Steak* and *Garcia v. Gloor* ("*Gloor*") that an English-only policy "effectively denies the privilege of speaking on the job" for employees with such "limited

proficiency in English" that their compliance is not a matter of choice. *Id.*; *Gloor* 618 F.2d 264, 270 (5th Cir. 1980).

For employees more proficient in English, compliance is "not a matter of preference" if the policy is pervasive or strictly enforced. *See e.g. Spun Steak*, 998 F.2d at 1488-89; *Gloor* 618 F.2d at 266-67. In *Jurado v. Eleven-Fifty Corporation* ("*Jurado*") a radio host could comply with the station's English-only policy because he was bilingual and the policy was "limited" to on-air broadcasting. 813 F.2d 1406, 1412 (9th Cir. 1987). Similarly, in *Spun Steak* bilingual production-line employees could "readily observe" the English-only policy because the policy excluded breaks and was not enforced against unconscious slips into Spanish. 998 F.2d at 1487, 1490.

On the other hand, in *EEOC v. Premier Operator Services* ("*Premier*") non-English employees could not readily comply with the English-only policy because it prohibited use of non-English *at all times* except when speaking to non-English-speaking customers and applied to employees' "automatic" and inadvertent use of Spanish. 113 F. Supp. 2d 1066, 1069-70 (N.D. Tex. 2000). Expert testimony made clear that adhering to such a strict English-only requirement "can be virtually impossible" for speakers whose primary language is not English. *Id.* at 1070.

Here, as in *Spun Steak*, a reasonable juror can find that some employees are not fully bilingual. *See* 998 F.2d at 1488-89. The Defendants state that all their Navajo employees are bilingual. Miller Decl. ¶ 6. However, speaking in English takes some Navajo employees two to three times longer than speaking in Navajo, calling into question their English abilities. Pierce Decl. ¶ 6.

Even if all Navajo employees at Burger Stop are fully bilingual, the evidence is clear that bilingual employees cannot readily comply with the Policy here because it is pervasive and

strictly enforced. *See id*. Pierce Decl. ¶ 5. The Policy as written applies *at all-times* unless speaking with a non-English-speaking customer, as in *Premier* where employees could not readily comply and distinguished from *Spun Steak* and *Jurado* where they could readily comply because the policies excluded breaks and off-air time respectively. *Id*. *See Spun Steak*, 998 F.2d at 1488-89; *Jurado*, 813 F.2d at 1412*; Premier*, Supp. 2d at 1069. The Millers also enforce the Policy here against even unintentional slips as distinguished from *Spun Steak* where "[i]t [wa]s *unclear* from the record whether Spun Steak strictly enforced the English-only rule." *See* 998 F.2d at 1483 (emphasis added); Miller Decl. ¶ 14; Pierce Decl. ¶ 10. In short, the Millers expect Navajo employees to speak Navajo with Navajo customers but *never* otherwise.

Yet it is "virtually impossible" for Navajo employees, whose native language is not English, to comply with a pervasive and strict policy. *Premier*, 113 F. Supp. 2d at 1070. Pierce Decl. ¶ 5. According to employee and expert testimony, Navajo employees cannot control occasional use of Navajo, especially immediately following a conversation with a Navajo-speaking customer. *Id.*; Diaz Decl. ¶ 7. The Defendants ignore this key fact when they rely on *Spun Steak* and *Jurado*, which had more limited and lenient policies, to argue that their policy is readily observable. Def.'s Mem. Supp. Summ. J. 7.

In sum, a reasonable juror can find that Navajo employees cannot readily observe the Policy due to limited language skills or the Policy's pervasiveness and strict enforcement. Accordingly, the Policy restricts their privilege of speaking. *See Premier*, 113 F. Supp. 2d at 1070.

b. A reasonable juror can find that the Policy creates a hostile work environment because the Policy is pervasive and strict without obvious business justification and exacerbates existing anti-Navajo sentiments.

[Omitted]

2. A reasonable juror can find that the Defendants have failed to establish a business necessity defense or that the Defendants' business needs are effectively served by a less discriminatory alternative.

Once a plaintiff establishes a prima facie case of disparate impact, the burden shifts to the employer to prove that the practice is consistent with business necessity. 42 U.S.C. §2000e-2(k); *Contreras v. Los Angeles* ("*Contreras*"), 656 F.2d 1267, 1275 (9th Cir. 1981). To do so, an employer must show that the policy "effectively carr[ies] out the business purpose it is alleged to serve" and that that purpose is "job-related," compelling, and essential to the business. *Gutierrez*, 838 F.2d at 1041-42. Once an employer makes this showing, the plaintiff can still prevail by showing that a less discriminatory alternative policy effectively serves the same business purpose. 42 U.S.C. §2000e-2(k); *Contreras*, 656 F.2d at 1275. On summary judgement, the non-moving plaintiff need only show a genuine issue as to the existence of a less discriminatory, comparably effective alternative. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993).

In short, for a defendant moving for summary judgment to establish a successful business necessity defense, the evidence must conclusively establish that the policy (1) effectively serves a business purpose (2) which is essential and compelling and (3) which no less discriminatory policy could serve. *See id.*; *Gutierrez*, 838 F.2d at 1043.

Here, the Defendants' business necessity defense must fail because a reasonable juror can find that the Policy is not an effective nor the least discriminatory policy for increasing workplace harmony, customer relations, or supervision, the Defendants' three alleged justifications.

a. Workplace harmony fails to justify the Policy because a reasonable juror can find that requiring English-only does not increase workplace harmony while a less discriminatory policy could.

[Omitted]

b. Customer relations also fails to justify the Policy because a reasonable juror can find that speaking Navajo does not bother customers and offensive commentary, which does, is more effectively addressed by prohibiting offensive speech than by prohibiting Navajo.

[Omitted]

c. Lastly, supervision fails to justify the Policy because a reasonable juror can find that supervision of all employee conversation is not essential to the business; meanwhile, hiring bilingual supervisors could provide adequate supervision with less discriminatory impact.

Workplace supervision justifies an English-only policy when it applies to communication that is essential to business operations and when non-English impedes that supervision. *See Gutierrez*, 838 F.2d at 1043. *See also Altus*, 433 F.3d at 1307. Further, no less discriminatory alternative may exist. *Gutierrez*, 838 F.2d at 1043.

In *Altus* the Tenth Circuit rejected a supervisory-based justification for an English-only policy because, one, the policy covered breaks and private phone conversations, for which no supervisory needs existed, and two, "scant" evidence suggested that speaking non-English caused communication problems with supervisors. 433 F.3d at 1307.

On the other hand, in *Montes v. Vail Clinic, Inc.* ("*Montes*") the Tenth Circuit held that supervision justified the English-only policy for three reasons: "clear and precise" communication between operating nurses and cleaning staff in the operating room was essential to safe hospital operations; the policy applied only to job-related discussions in the operating room; and many nurses did not speak Spanish. 497 F.3d 1160, 1171 (10th Cir. 2007). *See also Gonzalez v. Salvation Army* ("*Gonzalez*"), No. 89-1679-CIV-T-17, 1991 WL 11009376, at *3 (M.D. Fla. June 3, 1991), *aff'd without opinion*, 985 F.2d 578 (11th Cir. 1993) (noting that management did not understand Spanish).

Here, supervision does not justify the Policy because it applies to non-essential conversation. *See Altus*, 433 F.3d at 1307; *Gutierrez*, 838 F.2d at 1043; *Montes*, 497 F.3d at 1171. The Millers claim that their understanding all conversation is imperative to the business, but breaktime conversations, which the Policy covers, are not job-related or essential to operations. *Id.* Even when conversation is inappropriate, it does not raise essential safety or operating concerns as distinguished from *Montes*. *See* 497 F.3d at 1171. Additionally, the Millers' policy permits and encourages employees to speak Navajo with monolingual Navajo customers. Pierce Decl. ¶3. Since business does not require that the Millers understand these important job-related conversations, it cannot require that they understand intra-employee conversation. See *Gutierrez*, 838 F.2d at 1043. Finally, the Millers' alleged need to understand all conversation is disingenuous because, as in *Gutierrez*, the Millers recruited Navajo employees specifically for their bilingual abilities. 838 F.2d at 1043; Pierce Decl. ¶3.

Supervision also fails to justify the Policy because, as in *Altus*, the evidence fails to show that speaking Navajo prevents supervisors from supervising or effectively communicating with employees. *See Altus* 433 F.3d at 1307; *Montes*, 497 F.3d at 1171; *Gonzalez*, No. 89-1679-CIV-T-17 at *3. Here, the Millers are the only supervisors that the record makes clear cannot speak Navajo. Miller Dep. 9. And yet they only supervise two of twelve daily operating hours. *Id*. In fact, ninety percent of Burger Stop employees are Navajo, and so use of Navajo is more likely to enable than hinder supervisor-employee communication. Pierce Decl. ¶3.

Relatedly, a less discriminatory alternative clearly exists for supervising Burger Stop employees. Just as the court held in *Gutierrez*, the best way to ensure adequate supervision "would be to employ [Navajo]-speaking supervisors." 838 F.2d at 1043.

In sum, workplace supervision does not justify the Policy because a reasonable juror can find that supervising many of the conversations covered by Policy is not essential to the Miller's business. *See Altus*, 433 F.3d at 1307; *Gutierrez*, 838 F.2d at 1043; *Montes*, 497 F.3d at 1171. Further, there is "scant" evidence that non-English creates communication problems for Burger Stop's primary supervisors. *Id.* Lastly, hiring bilingual supervisors is a less discriminatory, comparably effective alternative. *Id.*

In conclusion the Millers' business necessity defense fails because the evidence does not show that the Policy's alleged aims are essential to the business or effectively served by the Policy. Further, for each there is a genuine issue for trial as to whether an alternative, less discriminatory policy exists.

IV. CONCLUSION

In conclusion, for the foregoing reasons, summary judgment should not be granted for the Defendants because a reasonable juror can find that the Policy causes disparate impact which business necessity fails to justify.

Applicant Details

First Name	**Aidan**
Middle Initial	**G**
Last Name	**Calvelli**
Citizenship Status	**U. S. Citizen**
Email Address	**acalvelli@jd24.law.harvard.edu**
Address	**Address** Street **386 Acorn Lane** City **Shelburne** State/Territory **Vermont** Zip **05482** Country **United States**
Contact Phone Number	**5858574935**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights-Civil Liberties Law Review** **Harvard Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Charles, Guy-Uriel
gcharles@law.harvard.edu
Suk-Gersen, Jeannie
jsg@law.harvard.edu
617-496-8834
Minow, Martha
minow@law.harvard.edu
617-495-4276

This applicant has certified that all data entered in this profile and any application documents are true and correct.

AIDAN G. CALVELLI
acalvelli@jd24.law.harvard.edu • (585) 857-4935 • 386 Acorn Lane, Shelburne, VT 05482

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals, Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a Shelburne resident, a rising third-year student at Harvard Law School, and an editor of the *Harvard Law Review*. Attached are my resume, transcript, and writing sample. The following professors are submitting letters of recommendation on my behalf:

Prof. Martha Minow	Prof. Jeannie Suk Gersen	Prof. Guy-Uriel Charles
minow@law.harvard.edu	jsg@law.harvard.edu	gcharles@law.harvard.edu
(617) 495-4276	(917) 749-5059	(617) 998-0825

I am passionate about voting rights and plan to pursue a public interest career in the field, aiming to later enter law teaching. At HLS, I've done democracy work through the Election Law Clinic and through internships with the DOJ Voting Section and the National Redistricting Foundation. I've also developed broad legal interests by engaging with scholarship as an Articles Editor on the *Harvard Law Review* and by exploring topics from defamation to de-platforming as a research assistant for Professors Jeannie Suk Gersen and Guy-Uriel Charles. Before HLS, I spent two years supporting inclusive economic growth with the Center on Rural Innovation, and I edited books on the presidency, free speech, and impeachment for Professor Corey Brettschneider.

I would be thrilled to clerk in my adopted home state of Vermont, especially for a judge whose advocacy helped pave the way for my moms to marry. Please let me know if I should send any additional information, and I thank you in advance for your consideration.

Sincerely,

Aidan G. Calvelli

Attachments

AIDAN G. CALVELLI

acalvelli@jd24.law.harvard.edu • (585) 857-4935 • 386 Acorn Lane, Shelburne, VT 05482

EDUCATION

HARVARD LAW SCHOOL, Cambridge, MA
J.D. Candidate, May 2024
Honors: Dean's Scholar Prizes in Legislation & Regulation, Labor Law, Election Law, and Constitutional History
Heyman Summer Internship
Activities: *Harvard Law Review*, Articles Editor, Vol. 137
Harvard Election Law Clinic, Student Attorney
Research Assistant to Profs. Guy-Uriel Charles, Jeannie Suk Gersen, and Michael Klarman (upcoming)
Harvard Civil Rights-Civil Liberties Law Review, Article Selection Editor
HLS Equal Democracy Project, Deputy Civic Engagement Director
Publications: Recent Regulation, *Internet Communication Disclaimers and the Definition of "Internet Public Communication,"* 136 HARV. L. REV. 2200 (2023).
Aidan Calvelli, *Moore Cases, More Problems*, FORDHAM L. VOTING RTS. & DEMOCRACY PROJECT (Mar. 8, 2023), https://fordhamdemocracyproject.com/2023/03/28/moore-cases-more-problems/.

BROWN UNIVERSITY, Providence, RI
A.B., *magna cum laude* with honors in Political Science (Theory), May 2019
Honors: Phi Beta Kappa
Philo Sherman Bennett Prize (best essay discussing the principles of free government)
Activities: *Brown Political Review*, Editor-in-Chief
Brown Progressive Action Committee, Co-Founder and Chair
Thesis: *Equal Partisan Consideration: A Theory of Constitutional Partisanship*

EXPERIENCE

U.S. Department of Justice, Civil Rights Division—Voting Section, Washington, D.C. Summer 2023
Volunteer Student Intern
Assist with filings for VRA Section 2 case challenging Georgia S.B. 202 and NVRA Section 6 case challenging Arizona H.B. 2492. Monitor jurisdictions for VRA language assistance compliance. Track seven states for evidence of voter intimidation.

National Redistricting Foundation, Washington, D.C Summer 2022
Litigation and Policy Intern
Drafted memo identifying state-level gerrymandering challenges since *Rucho v. Common Cause*. Cataloged map-drawing impasse procedures and partisan voter registration rules in every state. Charted the consistency of judicial review standards for redistricting and the fairness of special master-drawn maps. Created database of *Purcell* citations since 2020.

Center on Rural Innovation, Hartland, VT
Research and Communications Analyst Fall 2019 – Summer 2021
Helped local leaders in 21 rural communities nationwide build digital economy ecosystems. Wrote $300K AmeriCorps grant for technology job training placement. Developed $30M proposal for innovation campus renovation. Researched rural broadband expansion for federal policy report. Wrote 22 blogs, 4 op-eds, and 3 reports on education, co-working, and entrepreneurship.

Brown University, Providence, RI
Editor and Research Assistant for Prof. Corey Brettschneider Fall 2017 – Summer 2021
Led research and editing for two books on the constitutional presidency and citizen movements. Edited volumes on impeachment, religion clauses, Justice Ginsburg, and free speech. Assisted with law review article on democratic punishment.

California Second District Court of Appeal, Los Angeles, CA Summer 2018
Judicial Extern to Justice Luis Lavin
Reviewed appellate briefs as one of two undergraduates in a law student program. Drafted opinion affirming dismissal in *People v. Foster*. Drafted facts in *People v. Vasquez* and identified manslaughter instruction issue that led to reversal.

INTERESTS

Pickleball, word games, audiobooks, rolling fresh pasta, pick-up basketball, the Jazz Era, civic education, classical piano.

Harvard Law School

Date of Issue: June 8, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Aidan G Calvelli
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 7 Charles, Guy-Uriel	P	4
1002	Criminal Law 7 Kamali, Elizabeth Papp	P	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
1003	Legislation and Regulation 7 Rakoff, Todd * Dean's Scholar Prize	H*	4
1004	Property 7 Smith, Henry	H	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2
	Winter 2022 Total Credits:		2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 7 Gersen, Jeannie Suk	H	4
1001	Contracts 7 Coates, John	H	4
1006	First Year Legal Research and Writing 7A Tobin, Susannah	H	2
2167	Legal History: History of American Economic Regulation Mack, Kenneth	H	3
1005	Torts 7 Sargentich, Lewis	H	4
	Spring 2022 Total Credits:		17
	Total 2021-2022 Credits:		37

Fall 2022 Term: September 01 - December 31

2035	Constitutional Law: First Amendment Fallon, Richard	P	4
2928	Election Law Charles, Guy-Uriel * Dean's Scholar Prize	H*	3
2142	Labor Law Sachs, Benjamin * Dean's Scholar Prize	H*	4
2156	Non-profit Organizations and Law Minow, Martha	H	2
7008W	Writing in Conjunction with Non-profit Organizations and Law Minow, Martha	H	1
	Fall 2022 Total Credits:		14

Winter 2023 Term: January 01 - January 31

2181	Local Government Law Bowie, Nikolas	H	2
	Winter 2023 Total Credits:		2

Spring 2023 Term: February 01 - May 31

2453	Constitutional History II: From Reconstruction to the Civil Rights Movement Klarman, Michael * Dean's Scholar Prize	H*	3
8053	Election Law Clinic Greenwood, Ruth	H	3
3005	Election Law Clinical Seminar Greenwood, Ruth	H	2
2234	Taxation Warren, Alvin	H	4
	Spring 2023 Total Credits:		12
	Total 2022-2023 Credits:		28

Fall 2023 Term: August 30 - December 15

2163	American Legal History 1776-1865 Gordon-Reed, Annette	~	3
2472	Comparative Law: Ancient Law Lanni, Adriaan	~	3
2086	Federal Courts and the Federal System Field, Martha	~	5
2219	Regulation of Financial Institutions Tarullo, Daniel	~	4
	Fall 2023 Total Credits:		15

continued on next page

Harvard Law School

Record of: Aidan G Calvelli

Date of Issue: June 8, 2023
Not valid unless signed and sealed

Spring 2024 Term: January 22 - May 10

2000	Administrative Law Block, Sharon	~	4
2169	Legal Profession Wacks, Jamie	~	3
		Spring 2024 Total Credits:	7
		Total 2023-2024 Credits:	22
		Total JD Program Credits:	87

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 01, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I have had the pleasure of teaching Aidan Calvelli and working very closely with him as my research assistant. He received one of the highest grades in my Civil Procedure class when he was a first-year law student. He was also a student in my Election Law class where he was, not surprisingly, also spectacular. He is currently on the editorial board of the Harvard Law Review. I am delighted to recommend him as a clerk in your chambers. He has my highest recommendation and my utmost support. If I were a judge looking for an absolutely superb law, I would interview and hire him.

Having worked closely with Aidan for the past two years, I am well positioned to assess his capabilities. He is brilliant, thoughtful, and diligent. He is a standout student here at HLS. Without question, he has the analytical and intellectual skills required to be a great law clerk. Additionally, he has the perfect temperament. He is hardworking, kind, a self-starter, and responds well to feedback.

As a student, Aidan is without fault. He was always prepared for Civil Procedure. I'm a traditional Socratic teacher and Aidan was unflappable. He was similarly great in my Election Law Class where he was an active and valuable participant. Like the best of students, you could always rely on him to say something smart and go beyond where most students were willing to go.

He wrote an excellent paper for the class. The paper was about the aftermath of the Supreme Court's decision in Common Cause v. Rucho. The paper exhaustively examined how the states addressed the issue of partisan gerrymandering now that the Court has vacated the field. Aidan is an exceptional writer, and this paper is indicative of his prodigious ability. The paper is well-researched. The writing is excellent. The reasoning is pellucidly clear. The analysis is compelling. It is a first-rate paper.

Because was such a specular student, I hired him as my research assistant. Not surprisingly, his work has been outstanding. I have asked him to do a literature review on social media and deplatforming. He has prepared research memos for me on the role that magistrate judges play in state judicial systems. He has also assisted me in writing an amicus brief to the Supreme Court in the Moore v. Harper case. I have had the opportunity to evaluate his work up carefully. His writing is absolutely first-rate. His work has been, and continues to be, first-in-class.

In my view, this should be one of the easiest hiring decisions you will have this cycle. Aidan has impeccable judgment. His intellectual capabilities are nonpareil. His work ethic is second to none. There is no doubt in my mind that he will be a brilliant law clerk and lawyer. Consequently, it is my pleasure to recommend him and to give him my highest recommendation. In any event, please do not hesitate to contact me if you would like more information.

Sincerely,

Guy-Uriel Charles
Harvard Law School
Charles Ogletree, Jr. Professor of Law

May 31, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to recommend a fantastic student, Aidan Calvelli, a rising 3L and an Articles Editor of the Harvard Law Review, for a clerkship in your chambers. Aidan was first in my 1L Constitutional Law course and then he became my prized research assistant. I have no doubt that Aidan will be an incredible law clerk, and I urge you to hire him, though I am truly not looking forward to losing him on my own projects!

It was a great joy to have Aidan in my Constitutional Law course. From his first cold call, he offered impressive knowledge and analysis of doctrine, history, and theory. In class and in office hours, he was on a different level from most 1L students. I returned to his insightful comments and asked him to weigh in on debates building on them. His engagement continued throughout the course and only grew in impressiveness. Aidan untangled complicated questions, concisely stating rationales and engaged the class in debate while articulating difficult positions and drawing nuanced distinctions. In short essays that I assigned students to write, Aidan showed creativity in argument, which he expressed in clear writing, drawing from an unexpected variety and combination of sources and ideas. During the semester, he also managed to write and record two songs pertaining to my course -- one about Hugo Black and another about strict scrutiny -- evincing both humor and deft command of the material and accompanying himself on the piano while singing! Aidan wrote a strong Honors exam that reflected the skills he showed in class: an ability to concisely identify legal issues and construct cogent arguments on complex issues.

I immediately recruited Aidan as a research assistant, and since then his help has proven totally invaluable to me. He has worked with me on numerous articles and projects. He has efficiently produced excellent memos cataloging and categorizing complicated legal debates, gathered, synthesized, and summarized massive amounts of material, and provided bottom-line advice. He has been a clear and precise editor of drafts, with skills and instincts to rival the professional magazine editors I routinely work with. He has proven himself capable of both digging for minutiae and engaging high-level theory and structure, of being a valuable brainstorming partner, of providing respectfully critical feedback, and of getting great work done while juggling so much else on his plate. In editing my writing, he had a knack for identifying exactly the issues that I was or should be struggling with and providing the ideal level of intellectual and technical support.

In addition, I trust his judgment on legal questions. He came through on multiple occasions during crunch times, including exam periods. He even wrote a stellar legal research memo while fully immobile and recovering from leg surgery. Often without my even asking, he continues to find insights and sources to send me that might be helpful for legal questions I'm pursuing. His great ideas for improving my work, in addition to his prodigious and creative research help, have made me so reliant on him that I am sad at the thought that he will leave HLS. Aidan embodies an ideal combination of brilliance, hard work, discipline, and intellectual creativity. He's a rock star in the form of a young legal-intellectual nerd. I consider myself very fortunate to have a person of this caliber assisting me.

Beyond the formidable work he's done for me, my interactions with Aidan have made me confident that he will be highly valued as a co-worker in chambers, including in informal interactions and discussions. In office hours during his 1L year, he shared his internal conflict over Obergefell v. Hodges—struggling with its reasoning while overjoyed that it allowed people like his two moms get married—illustrating the humanity with which he tries to approach legal questions. He's shown a passion for legal argument, an eagerness to support his peers' writing, and an exacting approach to work that is characteristic of top-flight law clerks. And in conversation, he's proven thoughtful and public-minded about his own career path, committed to supporting democracy and voting rights while developing his ideas on how to foster civic participation.

I hope I have been clear that Aidan is at the top of the heap. I have utmost confidence in recommending him to you, and I do so with ardent enthusiasm. I am certain you will be very happy to have him in your chambers.

Sincerely,

Jeannie Suk Gersen
John H. Watson, Jr. Professor of Law
Harvard Law School

Jeannie Suk-Gersen - jsg@law.harvard.edu - 617-496-8834

June 02, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Aidan Calvelli is one of the most impressive students I have encountered in the past couple of years, and I write to recommend him as he applies to work as your law clerk. In my course on Nonprofit Organizations and the Law, he participated avidly in both doctrinal explorations (including tax, First Amendment, fiduciary law) and policy considerations addressing the role of nonprofit organizations in society, and notably, in pluralism and fairness.

I remember his distinctive effort to critique the notion that philanthropy is charity, and instead pushed to see it as obligation and a necessity to advance accountable governance structures. He was constructive and imaginative; he proposed a solution to the problem that individuals get charitable deductions no matter which charity they give money to, and he called it the “rebuttable deduction”— the idea being that if deductions ultimately serve a nonprofit value (advancing pluralism, increasing giving, supporting public policy), the deduction stays; if not, it is de-credited against future taxes. He truly made splendid comments in class, and he went the extra mile, following up with discussions out of class and sharing email articles that he thought would be valuable for future offerings of the course. He fulfilled the writing requirements of the course with a short paper and with a final paper, longer than the requirement, hence receiving an extra academic credit.

Aidan’s final paper, Five Hundred and One Forms of Politics: 501(c) and the Perils of Political Line-Drawing, described and analyzed the effects of the absence of a consistent definition of politics in the federal tax code. Focusing on lobbying limitations and dark money contributions. he argued the Code fails to address dimensions of politics beyond the specific limitations that the Code prohibits. The paper proposed three potential solutions: end the subsidy for policy-oriented charities; allow all nonprofits to engage in political activity, or selectively subsidize nonprofit activity that advances nonprofits’ democratic role. It provides clear and effective analysis, rigorous reading of the relevant statute, and a range of constructive alternatives. I suggested he could do more to distinguish line-drawing problems around “lobbying” and line-drawing around “politics,” and to anticipate line-drawing problems with his third alternative. I told him that I would like to use the paper as a class reading in a future version of the course.

Aidan has excelled across a wide range of courses and is an active member of the Harvard Law Review. In that context, he wrote an analysis of the Federal Election Commission’s online advertising disclaimer regulation. He argued that the regulation exposes the limits of Federal Election Commission enforcement capabilities. He also urged congressional action to fix the shortfall. He responded well to my comments, and incorporated my suggestion of corporate involvement through sector-wide participatory rulemaking.

He has developed an expertise in voting rights and civic engagement. I predict he will pursue a career combining work in that field, and may also pursue law teaching. Aidan writes very well. Personally, he is a fine listener and an optimistic, generous individual. I have very high regard for his writing and research abilities and recommend him strongly.

Sincerely,

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WRITING SAMPLE

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Below is an analysis of a Federal Election Commission regulation on disclaimers for online political advertisements. The writing sample is substantially my own work and incorporates technical and substantive suggestions from fellow *Law Review* editors and faculty advisors.

RECENT REGULATION

FEDERAL ELECTIONS — CAMPAIGN FINANCE — FEC UPDATES ONLINE AD DISCLAIMER RULES. — Internet Communication Disclaimers and Definition of "Public Communication," 87 Fed. Reg. 77,467 (Dec. 19, 2022) (codified at 11 C.F.R. pts. 100, 110).

In 2022 alone, political campaigns and their backers spent an estimated $8.9 billion on advertising.[1] Many of those ads had to state who funded them.[2] But a gap in the rules of the Federal Election Commission (FEC) meant that many online ads lacked these "disclaimers."[3] On December 1, 2022, the FEC addressed that gap, passing a regulation to apply new disclaimer rules to most online ads.[4] This regulation is an important step, bringing the values of disclosure to where so much of American politics happens: the internet.[5] Yet it's also too small a step — it exempts certain ads,[6] is at risk of underenforcement, and is limited by law. To more fully bring disclaimers online, Congress will need to act.

Since 1975, the FEC has enforced Congress's campaign finance disclosure[7] regime — one designed to inform voters, deter corruption, and police statutory violations.[8] That regime, built for the world of TV and radio, has long applied uncertainly to the internet. Early signs indicated disclosure would translate easily to cyberspace, as the FEC in 1995 applied the disclaimer policies of the Federal Election Campaign Act of 1971 (FECA) to many online ads.[9] But in 2002, the FEC backtracked, exempting nearly all internet-based ads from the beefed-up disclaimer

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[1] ADIMPACT, ADIMPACT'S 2022 POLITICAL CYCLE-IN-REVIEW 15 (2022).

[2] *Advertising and Disclaimers*, FEC, https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers [https://perma.cc/BH54-LQJN].

[3] Internet Communication Disclaimers and Definition of "Public Communication," 87 Fed. Reg. 77,467, 77,468 (Dec. 19, 2022) (codified at 11 C.F.R. pts. 100, 110) [hereinafter Final Rule] (noting that FEC rule implementing Bipartisan Campaign Finance Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code), exempted "communications over the internet" from disclosure requirements).

[4] *See id.* at 77,467.

[5] *See Online Political Ad Spending*, OPENSECRETS (Apr. 22, 2022), https://www.opensecrets.org/online-ads [https://perma.cc/5GHA-Q9NX].

[6] *See* Taylor Giorno, *Federal Election Commission Passes New Digital Ad Disclosure Rule*, OPENSECRETS (Dec. 1, 2022, 3:36 PM), https://www.opensecrets.org/news/2022/12/federal-election-commission-passes-new-digital-ad-disclosure-rule [https://perma.cc/R44Y-BN26].

[7] "Disclaimers" are one category of "disclosures." Disclosure refers generally to the laws that track and publicize where campaign money comes from and how it is spent. Disclaimers refer specifically to rules that say who paid for an ad. *See* R. SAM GARRETT, CONG. RSCH. SERV., IF10758, ONLINE POLITICAL ADVERTISING: DISCLAIMERS AND POLICY ISSUES 1 (2019).

[8] *See 40th Anniversary Timeline*, FEC (2015), https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml [https://perma.cc/6E4D-6DSA]; Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam) (describing state's interests in disclosure).

[9] Final Rule, *supra* note 3, at 77,468.

requirements of the Bipartisan Campaign Reform Act of 2002[10] (BCRA).[11] The federal judiciary soon joined the fray, forcing the FEC to include internet ads Congress intended to cover,[12] so the FEC mandated disclaimers for paid ads on websites.[13] Amid this back-and-forth, advertisers sought clarity on when the rule applied, but the FEC couldn't provide it, often deadlocking or issuing imprecise opinions.[14]

This regulatory uncertainty was unsustainable. So, in 2011, the FEC began a rulemaking aimed at bolstering online disclaimers.[15] Five years passed without a new rule, and by then, technology had transformed, leaving an advertising regime designed for "websites" increasingly obsolete in a world of wearables, smart devices, and apps.[16] To match the modern internet, the FEC twice sought new comments.[17] Then, right before expanding disclaimers to "internet-enabled device[s] or application[s],"[18] the Commission deadlocked before the 2018 midterms.[19]

Four more years elapsed before the rule regained momentum. In November 2022, the FEC prepared to pass a robust regulation — one applying disclaimers to nearly every online ad.[20] That robustness evoked resistance. Commissioner Sean Cooksey called the rule "burdensome and confusing,"[21] while libertarian groups decried it for sweeping in political speech.[22] The FEC yielded, cancelling a planned vote on "Draft A" and releasing a scaled-back "Draft B."[23]

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[10] Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

[11] *See* Final Rule, *supra* note 3, at 77,468. BCRA requires disclaimers on ads by political committees that advocate for or against candidates or solicit contributions, but it carves out "small items" and "impracticable" exceptions. *Id.* at 77,467.

[12] *See* Shays v. FEC, 337 F. Supp. 2d 28, 65–71 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

[13] *See* Final Rule, *supra* note 3, at 77,468.

[14] *See id.* at 77,468–69.

[15] *See id.* at 77,469.

[16] *Id.* at 77,469 & n.3. Consider the potential loopholes from focusing only on websites: If Senator Bernie Sanders posted an ad to Facebook.com, it would need a disclaimer. But if Senator Sanders posted that same ad to the Facebook app, it arguably would not be covered.

[17] *See id.* at 77,469.

[18] *Id.* (quoting Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12,864, 12,864 (Mar. 26, 2018) (codified at 11 C.F.R. pts. 100, 110)).

[19] *See* Brian Beyersdorf, Note, *Regulating the "Most Accessible Marketplace of Ideas in History": Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1088–89 (2019).

[20] *See* Ellen L. Weintraub (@EllenLWeintraub), TWITTER (Nov. 10, 2022, 3:48 PM), https://twitter.com/EllenLWeintraub/status/1590808559599624211 [https://perma.cc/9UJX-Z3WS].

[21] Lachlan Markay, *FEC Targets Digital Ad Disclosure*, AXIOS (Nov. 10, 2022), https://www.axios.com/2022/11/11/fec-targets-political-digital-ad-disclosure [https://perma.cc/WAX6-PRLH].

[22] *See, e.g.*, Brad Smith & David Keating, *FEC Draft Rule on Internet Communications Disclaimers Needs More Work*, INST. FOR FREE SPEECH (Nov. 16, 2022), https://www.ifs.org/expert-analysis/fec-draft-rule-on-internet-communications-disclaimers-needs-more-work [https://perma.cc/5MYD-TH3K].

[23] *See* Campaign Legal Ctr., Comment Letter on Proposed Rule for Internet Communication Disclaimers and Definition of "Public Communication" (Nov. 30, 2022), https://sers.fec.gov/fosers/showpdf.htm?docid=420944 [https://perma.cc/V6F6-DBM4] [hereinafter Campaign Legal Center Comment Letter].

Just three days later, the FEC passed Draft B by a 5–0 vote.[24] The new rule makes two main changes to online disclaimers. First, it mandates disclaimers for "internet public communications," which now include ads that are "placed for a fee" on "website[s], digital device[s], application[s], [and] advertising platform[s]."[25] This new definition expands the old regime — which applied just to websites — yet omits Draft A's coverage of ads "promoted" for a fee and ads on "services."[26] The rule also applies to online ads regardless of whether the person who paid to place the ad originally created or distributed it.[27]

Second, the regulation defines what the mandated disclaimers must include. Beyond what's applicable to all disclaimers — like "clear and conspicuous" presentation[28] — internet-specific rules require disclaimers that are viewable "without taking any action," big enough to be "clearly readable," and displayed "with a reasonable degree of color contrast."[29]

Importantly, however, not all online ads need to meet these general disclaimer rules. To address the longstanding issue of space constraints, the new rule allows for "adapted disclaimers" when a full disclaimer would take up more than one quarter of the ad.[30] An adapted disclaimer must state who paid for the ad, but instead of locating that information on the ad itself, it just needs to give clear notice of how and where to find it.[31] Users must be able to access this information in one move or fewer — by, for example, scrolling over the ad or clicking a link.[32]

Chairman Allen J. Dickerson and Commissioner James E. Trainor III filed an Interpretive Statement.[33] To them, strict disclosure requirements can infringe "core political speech,"[34] so they must do no more than inform a viewer about an ad's funder.[35] The Commissioners thus framed the new regulation as more of a clarification than an

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[24] *See* Cristiano Lima & Aaron Schaffer, *FEC Expands Digital Ad Disclosure Rules, But Watchdogs Say Gaps Remain*, WASH. POST (Dec. 2, 2022, 8:59 AM), https://www.washingtonpost.com/politics/2022/12/02/fec-expands-digital-ad-disclosure-rules-watchdogs-say-gaps-remain [https://perma.cc/M6NW-QJE8]. Commissioner Ellen Weintraub abstained. *See id.*

[25] 11 C.F.R. § 110.11(c)(5)(i).

[26] Campaign Legal Center Comment Letter, *supra* note 23; *see also* Giorno, *supra* note 6.

[27] 11 C.F.R. § 110.11(c)(5)(ii).

[28] *Id.* § 110.11(c)(1); *see also id.* § 110.11(b).

[29] *Id.* § 110.11(c)(5)(iii)(A)–(C). A disclaimer for a video, for example, must be "visible for at least 4 seconds and appear without the recipient of the communication taking any action." *Id.* § 110.11(c)(5)(iii)(D).

[30] *Id.* § 110.11(g)(2). This exception adds to the "small items" and "impracticable" exceptions. *See* Final Rule, *supra* note 3, at 77,475.

[31] 11 C.F.R. § 110.11(g)(1)(i)–(ii).

[32] *Id.* § 110.11 (g)(1)(iii).

[33] Allen J. Dickerson & James E. "Trey" Trainor, III, Interpretive Statement (Dec. 1, 2022), https://www.fec.gov/resources/cms-content/documents/Interpretive-Statement-Regarding-Reg-2011-02-Internet-Disclaimers-Dickerson-Trainor.pdf [https://perma.cc/XA7D-86RJ].

[34] *Id.* at 7.

[35] *See id.* at 3.

expansion — a way to fix the FEC's past "patchwork approach to the internet" and provide "clearer guidance" for novel internet advertising.[36] They also defended the regulation's broad wording, arguing that the FEC should "draw upon technological minutia only as necessary" in a "fleeting and ephemeral" online world and instead prioritize "essential First Amendment principles."[37]

Commissioner Sean J. Cooksey filed a Concurring Statement.[38] He had opposed Draft A, believing it would've "dramatically expanded" the FEC's regulatory authority over protected speech.[39] But he approved Draft B because of what he saw as its "substantially narrowed" scope, applying just to "traditional paid advertising placed on the internet" and "providing sufficient flexibility for different kinds of ads,"[40] with multiple exceptions available.[41] To him, the regulation preserved the FEC's "light touch to regulating political activity online" and saved "the internet's special capacity to foster . . . political speech."[42]

The FEC's online disclaimer regulation is a step forward, helping bring the values of disclosure online.[43] It is, however, likely too small a step — missing too many ads and risking underenforcement. The FEC could fix these limitations with a new rule. But because these shortcomings are endemic to the FEC disclosure regime — and because the Supreme Court has constrained the FEC's campaign finance power — Congress will need to strengthen online disclaimers.

The first limit of the regulation is its scope. In Draft A, backers touted the proposal as comprehensive, applying to nearly all online ads.[44] But the adopted Draft B self-consciously shrinks the rule's reach. While Draft A applies to ads "placed *or promoted*" for a fee, Draft B applies only to ads "placed" for a fee; and while Draft A requires disclaimers for ads on "services," Draft B cuts that term, reaching only ads on a "website, digital device, application, or advertising platform."[45]

No one knows, for example, exactly how "promot[ing]" an ad is different from "plac[ing]" one, or how "service" differs from other

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[36] *Id.* at 8.
[37] *Id.*
[38] Final Rule, *supra* note 3, at 77,479 (concurring statement of Commissioner Sean J. Cooksey).
[39] *Id.*
[40] *Id.*
[41] *Id.* at 77,479–80.
[42] *Id.* at 77,480.
[43] *See Online Political Ad Spending*, *supra* note 5.
[44] *See* Weintraub, *supra* note 20. This comprehensive coverage could have brought transparency and accountability to the $2.1 billion spent on online political adds from 2018 to 2022. *See Online Political Ad Spending*, *supra* note 5.
[45] Campaign Legal Center Comment Letter, *supra* note 23, at 2. The FEC is conducting a separate rulemaking on whether to extend the regulation to ads "promoted for a fee." *See* Memorandum from Allen Dickerson, Chairman, FEC, to Office of the Commission Secretary, FEC 1 (Nov. 28, 2022), https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-55-A.pdf [https://perma.cc/UU5M-FFPU].

locations.[46] Yet the FEC's deletions create exploitable gaps. Will an ad be "promoted" — and thus exempt — if a campaign pays a social media influencer to share a video or pays Facebook for more "reach" on its post?[47] Will an ad be on a "service" — and thus exempt — if it's on Netflix's streaming service on a Roku TV? These line-drawing questions are sure to arise; watchdog groups worry the omissions will create "categories of political advocacy where the regulations won't apply."[48]

The second limit of the regulation is the risk that it will be applied narrowly. Despite the rule's last-minute haircut, it still *could* be read to reach most online activity. But the rule's development suggests the FEC will take a less capacious view. The Commissioners' actions support this narrow reading: Commissioner Weintraub, a champion of disclosure and Draft A, abstained from Draft B; Commissioner Cooksey, an opponent of Draft A, believes Draft B would avoid "unnecessarily burdening political speech,"[49] which suggests he thinks it won't apply broadly.[50] The Interpretive Statement further indicates a small reach: Chairman Dickerson and Commissioner Trainor emphasize the rule's exceptions and like that it "shields a wide swath of online speech."[51] For an agency known for inertia,[52] the fact that three Commissioners have trumpeted the rule's confines shows the FEC is unlikely to enforce the regulation aggressively.

Disclaimer advocates might believe these flaws are fixable — and the next fight is for the FEC to fix them.[53] But the regulation's wide exceptions and the FEC's reluctance to enforce it strongly mirror problems found throughout the FEC's disclosure regime — suggesting the rule's issues run deeper than the agency itself can correct.

On exceptions, the FEC has long struggled to police disclosure for many nonprofits and Super PACs, just like it appears set to do for online ads. In *Citizens United v. FEC*,[54] the Court upheld BCRA's disclosure provisions yet created loopholes for corporations and other groups, forming what Professor Richard Hasen calls "gaping holes" in the regime.[55] These holes grew as "social welfare" organizations and Super

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[46] *See* Shanna Ports, *Questions Remain Regarding New FEC Digital Ad Rules*, CAMPAIGN LEGAL CTR. (Dec. 7, 2022), https://campaignlegal.org/update/questions-remain-regarding-new-fec-digital-ad-rules [https://perma.cc/29P6-N7TR] ("The full implications of the new rule and how Commissioners will apply and enforce it remain unclear . . . .").

[47] *See* Lima & Schaffer, *supra* note 24.

[48] *Id.*

[49] Final Rule, *supra* note 3, at 77,479 (concurring statement of Commissioner Sean J. Cooksey).

[50] *See* Lima & Schaffer, *supra* note 24.

[51] Dickerson & Trainor, *supra* note 33, at 2; *see also* Ports, *supra* note 46.

[52] *See generally* ANN M. RAVEL, DYSFUNCTION AND DEADLOCK (2017).

[53] Optimists in this vein might note the FEC didn't give up on the "promoted" language, but rather moved it to a later rulemaking. *See* Memorandum from Allen Dickerson to Office of the Commission Secretary, *supra* note 45, at 1.

[54] 558 U.S. 310 (2010).

[55] Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 557 (2012); *see also Citizens United*, 558 U.S. at 369–70.

PACs proliferated, funneling into elections dark money whose origins the FEC deemed itself largely powerless to reveal.[56] Other forms of bankrolled political speech also escape the FEC's grasp, such as speech by trolls or foreign bots.[57] These limits, and the rules they make exceptions to, are different from those for online disclaimers. But they help illustrate how the gaps in online disclaimers mirror recurring problems in regulating politics on the internet.[58]

On enforcement, the Commissioners' statements implying the rule won't affect much online speech is troubling in light of the agency's history of underenforcing disclosure. Much of that history is attributable to the agency's oft-critiqued 3–3 bipartisan structure, which invites either compromised enforcement or none at all.[59] For example, after the D.C. Circuit functionally enabled the rise of Super PACs,[60] the FEC responded with a rule enforcing disclosure in only highly circumscribed circumstances.[61] The same problem arose in early internet-exception cases: when the FEC deadlocked on enforcement actions, online giants like Facebook avoided disclaimer compliance.[62] The FEC's limited enforcement powers[63] create the potential for recalcitrant commissioners to impose inertia — precisely what the Interpretive and Concurring Statements signal.

From this angle, the shortcomings of the rule are structural — not just specific to internet ads. On top of that, the Supreme Court, despite often invoking disclosure's virtues, has capped the FEC's ability to improve its disclosure regime on its own.[64] That means a solution will

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[56] "Social welfare" organizations, or 501(c)(4)s, are nonprofits that need not disclose their donors. *See Frequently Asked Questions About 501(c)(4) Groups,* OPENSECRETS, https://www.opensecrets.org/outside-spending/faq [https://perma.cc/B6CA-LKET]. The D.C. Circuit enabled Super PACs in *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010), but even there, it endorsed the value of disclosure, *id.* at 696, 698. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1459 (2014). The FEC responded to *SpeechNow* by issuing advisory opinions that let certain committees accept money without limit. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 1006 (2011).

[57] *See* Beyersdorf, *supra* note 19, at 1097 (explaining that trolls and bots can purchase online political ads while evading detection by the FTC).

[58] *Cf.* Issie Lapowsky, *Big Tech's Ad Rules Leave Plenty of Room for Dark Money to Hide*, PROTOCOL (Apr. 8, 2020), https://www.protocol.com/dark-money-facebook-political-ads [https://perma.cc/7YYQ-MDPS] (noting gaps in social media companies' disclosure rules).

[59] *See* RAVEL, *supra* note 52, at 1.

[60] *See SpeechNow*, 599 F.3d at 698.

[61] S*ee* Briffault, *supra* note 56, at 1006. Similarly, after *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the FEC divided on whether donations not earmarked for electioneering needed disclosures, so advertisers assumed they didn't. *See* Heerwig & Shaw, *supra* note 56, at 1463–64.

[62] *See* Final Rule, *supra* note 3, at 77,468–69 (describing four advisory opinions and advisory opinion requests that functionally exempted internet advertisers from disclaimer requirements).

[63] *See* CREW v. FEC, 55 F.4th 918, 922 (D.C. Cir. 2022) (Millett, J., dissenting from the denial of rehearing en banc) (mem.) (noting that decision to deny rehearing licenses minority of FEC commissioners to block judicial review of agency nonenforcement decisions).

[64] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 369 (2010).

have to come from outside the agency — and inside Congress, by passing a law that helps the FEC avoid two Court-imposed constraints.

First, Congress has to address the barren regulatory landscape the Court has left — one that has divorced disclaimer rules from their original statutory purpose. While the Court has almost always upheld disclosure laws,[65] it has done so while striking down nearly all substantive reforms, leaving disclosure as the *only* tool remaining to address money in politics.[66] That theoretically doesn't curtail the FEC, which could just enforce the disclosure laws that remain. But Congress did not intend these disclosure rules to exist on their own, severed from the rest of FECA and BCRA.[67] The Court may have neutered the FEC's ability to enforce a *comprehensive* regulatory regime, but Congress retains the power to make new disclosure policies designed to stand alone.[68]

Second, to survive a judiciary increasingly skeptical of disclosure, Congress has to better tailor disclaimer requirements to the purpose of disclaimers. No case has directly threatened disclosures like this rule. Yet courts have indicated their approval is waning. In *Americans for Prosperity Foundation v. Bonta*,[69] the Supreme Court found that a California law requiring charities to disclose their big donors' names failed exacting scrutiny, as it burdened donors' associational rights while being "dramatic[ally] mismatch[ed]" from the state's antifraud interest.[70] And in *Washington Post v. McManus*,[71] the Fourth Circuit found that a Maryland law requiring online platforms to disclose facts about the ads they publish was unconstitutional compelled speech.[72] These tailoring and free speech concerns[73] are beyond the power of the FEC, which

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65 The Court upheld disclosure in multiple cases from 1976 to 2000, *see* Heerwig & Shaw, *supra* note 56, at 1453 & n.50, and endorsed BCRA's expanded disclosure rules in 2003 in *McConnell v. FEC*, 540 U.S. 93 (2003). Later, in *Citizens United*, the Court called disclosure "a less restrictive alternative to more comprehensive regulations of speech." 558 U.S. at 369 (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986)).

66 Nearly every law review article on disclosure seems to call disclosure the last campaign finance tool left. *See, e.g.*, Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 11 (2018); Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 433 (2016).

67 *See* Levinson, *supra* note 66, at 433 (arguing Congress intended campaign finance rules to work in tandem, so stakeholders should be wary of Court assuming one works alone); *see also* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 135 (2018) ("Campaign finance disclosure laws . . . have been a boon to deregulators.").

68 *Cf.* Heerwig & Shaw, *supra* note 56, at 1470 (citing studies showing how disclosure can be effective on its own, but only "under certain conditions and in certain forms").

69 141 S. Ct. 2373 (2021).

70 *Id.* at 2385–86.

71 944 F.3d 506 (4th Cir. 2019).

72 *Id.* at 514–15; *see also* David L. Hudson Jr., *4th Circuit Invalidates Maryland Disclosure Law on Internet Political Ads*, FREE SPEECH CTR. (Dec. 12, 2019), https://www.mtsu.edu/first-amendment/post/412/4th-circuit-invalidates-maryland-disclosure-law-on-internet-political-ads [https://perma.cc/NQV4-ATYU].

73 The Court in *Bonta* noted that exacting scrutiny applies to "compelled disclosure" cases even in "nonelection" contexts. *Bonta*, 141 S. Ct. at 2383. Similarly, *McManus* suggested a "garden variety campaign finance regulation[]" would more likely be upheld. 944 F.3d at 517.

can't alter a statute's purpose. Congress, however, can — and should specify how an expansive online disclaimer rule promotes information or fights corruption.

Congress has multiple ways to enhance online disclaimers. One path would be to adopt Draft A's coverage of ads "promoted" for a fee and clarify the rules apply to ads on "services" (or even "any other online format") — narrowing the rule's potential exceptions.[74] Another would be to bolster the disclaimers themselves, making adapted disclaimers "require" (not just "enable") the viewer to see the disclaimer to scroll over.[75] And a third track might be to bolster enforcement by requiring the hosts of online ads to develop public databases of who pays for which ads on their platforms.[76] Yes, full-scale campaign finance reform is off the table.[77] But in disclosure, Congress has the legal authority and bipartisan support[78] needed to provide strong, clear rules for the FEC to enforce.

The FEC's online disclaimer rule is a step forward, helping voters know more about who funds the ads they see online. Still, its gaps in scope and enforcement show the limits of leaving disclosure's reach to the FEC. To make online disclaimers as strong as they should be, Congress has to act.

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[74] For a current effort to do so, see Memorandum from Allen Dickerson to Office of the Commission Secretary, *supra* note 45.

[75] *See* 11 C.F.R. § 110.11(g)(1)(ii)–(iii).

[76] The Honest Ads Act, which failed as part of H.R. 1, proposed a similar database. *See* Honest Ads Act, S. 1356, 116th Cong. § 8(j)(1)–(2) (2019).

[77] Transforming the FEC is unlikely in the near term, given that H.R. 1, which was designed to fix the failures of the FEC, failed to pass. *See* Tracy King, *Three Big Ways the For the People Act Would Fix the FEC*, CAMPAIGN LEGAL CTR. (Feb. 23, 2021), https://campaignlegal.org/update/three-big-ways-people-act-would-fix-fec [https://perma.cc/729G-83JC]; *see also* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 255–56, 256 n.6 (2010) (describing and citing failed FEC reform efforts).

[78] Every Commissioner, at least in theory, supported expanding disclaimers to online ads. *See* Lima & Schaffer, *supra* note 24 (noting 5–0 vote, with Commissioner Weintraub abstaining).

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Date of JD/LLB	**May 31, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard International Law Journal** **Harvard Civil Rights – Civil Liberties Law Review**
Moot Court Experience	**No**

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June 12, 2023

The Honorable Beth Robinson
U.S. Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I am a rising third-year law student at Harvard Law School. I write to apply for a clerkship in your chambers at the United States Court of Appeals for the Second Circuit for the 2024 term.

As a person raised by LGBTQ parents, I admire your commitments to social justice, the impact your career has made on our legal system, and your achievements as the first openly LGBTQ person to serve on a federal circuit court. It would be a privilege to have an opportunity to interview for a position in your chambers.

Attached please find my resume, law school transcript, undergraduate transcript, and writing sample. The following people will submit letters of recommendation separately:

- Professor Vicki Jackson, Harvard Law School, vjackson@law.harvard.edu, 617-496-0555
- Professor Benjamin Sachs, bsachs@law.harvard.edu, 617-496-6424

I have prior experience working for a federal court and possess strong legal research and writing skills. I have gained additional experience with litigation in my current role as a legal intern for the Alaska Public Defender Agency. I am committed to serving the public and I would be honored to work in your chambers.

If there is other information that would be helpful to you, please let me know. Thank you for your time and consideration.

Sincerely,

Elliot Caron-Vera

Elliot Caron-Vera

113 Hampshire St. 2R, Cambridge, Massachusetts 02139
413.320.9687 · ecaronvera@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, Massachusetts
Candidate for Juris Doctor, May 2024
Honor: L. Anthony Sutin Public Service Fellowship
Activities: Research Assistant to Professor Sergio Campos
Harvard Law and Political Economy Association, Event Coordinator
Harvard International Law Journal, Vol. 63 No. 2, Line Editor
Harvard Civil Rights – Civil Liberties Law Review, Vol. 57 No. 1, Citation Checker

Skidmore College, Saratoga Springs, New York
Bachelor of Arts, *magna cum laude* in Philosophy and English Literature, May 2018
Honor: Cooper Barnet Prize (awarded to outstanding senior with a major in Philosophy)
Study Abroad: Trinity College Dublin, Dublin, Ireland, September 2016 – May 2017

EXPERIENCE

The Alaska Public Defender Agency, Fairbanks, Alaska
Legal Intern, May 2023 – Present
Provide representation to indigent persons facing misdemeanor charges, managing caseload of approximately forty cases. Advocate in court at arraignments, bail hearings, evidentiary hearings, trials, and sentencing hearings. Advise clients, research and write motions, and negotiate settlements.

Harvard Prison Legal Assistance Project, Cambridge, Massachusetts
Student Attorney, September 2021 – Present*; Impact Litigation Director*, May 2022 – Present
Represent incarcerated people facing disciplinary and parole proceedings as Student Attorney. Responsibilities include advising clients, reviewing discovery, writing dispositive motions, and advocating at hearings. As Impact Litigation Director, responsibilities include strategizing impact litigation projects, supervising student volunteers, and contributing substantively to pending matters by researching legal issues and drafting motions.

Housing Law Clinic, Harvard Legal Services Center, Jamaica Plains, Massachusetts
Student Attorney, January – April 2023
Represented individuals facing eviction proceedings in Boston Housing Court. Conducted intake, drafted pleadings, and advised clients. Participated in court mediations and negotiated with opposing counsel. Researched and wrote dispositive motions. Volunteered at legal assistance programs, advising pro se tenants.

Hon. Edgardo Ramos, U.S. District Court for the Southern District of New York, New York, New York
Judicial Intern, June 2022 – July 2022
Reviewed party submissions, conducted research, and drafted memoranda to resolve pending motions to dismiss and motions for summary judgment. Observed civil and criminal proceedings in court.

Curran, Berger & Kludt, Northampton, Massachusetts
Paralegal, September 2020 – July 2021
Corresponded with clients, gathered evidence, and compiled application materials for family, employment, and humanitarian-based immigration petitions. Researched and drafted memoranda for pending asylum applications. Drafted motion for summary judgment for case pending in federal court.

PERSONAL

Reading ability in Spanish. Prior experience as barista, restaurant host, garbage collector, producer's assistant.

Harvard Law School

Date of Issue: May 26, 2023
Not valid unless signed and sealed
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Record of: Elliot Caron-Vera
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 5 Sachs, Stephen	P	4
1001	Contracts 5 Bar-Gill, Oren	P	4
1002	Criminal Law 5 Natapoff, Alexandra	H	4
1006	First Year Legal Research and Writing 5B Winsberg, Sarah	H	2
1005	Torts 5 Goldberg, John	H	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1055	Introduction to Trial Advocacy Newman, Thomas	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 5 Gersen, Jeannie Suk	H	4
2412	Constitutions, Law, and Empire Gordon-Reed, Annette	H	2
1006	First Year Legal Research and Writing 5B Winsberg, Sarah	P	2
1003	Legislation and Regulation 5 Rakoff, Todd	H	4
1004	Property 5 Mack, Kenneth	P	4
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		37

Fall 2022 Term: September 01 - December 31

3167	Advanced Comparative Perspectives on U.S. Law Campos, Sergio	CR	1
2048	Corporations Catan, Emiliano	P	4
2079	Evidence Brewer, Scott	P	4
2142	Labor Law Sachs, Benjamin	H	4
2370	Legal History: English Legal History Donahue, Charles	H	3
	Fall 2022 Total Credits:		16

Winter 2023 Term: January 01 - January 31

2050	Criminal Procedure: Investigations Whiting, Alex	P	3
	Winter 2023 Total Credits:		3

Spring 2023 Term: February 01 - May 31

2086	Federal Courts and the Federal System Jackson, Vicki	H	4
8034	Housing Law Clinic Devanthery, Julia	H	3
2199	Housing Law Clinical Workshop Devanthery, Julia	H	2
2831	Mind and Criminal Responsibility in the Anglo-American Tradition Kamali, Elizabeth Papp	H	2
3133	Workshop on Law and Political Economy Benkler, Yochai	H	2
	Spring 2023 Total Credits:		13
	Total 2022-2023 Credits:		32

Fall 2023 Term: August 30 - December 15

2035	Constitutional Law: First Amendment Weinrib, Laura	~	4
2069	Employment Law Sachs, Benjamin	~	4
2761	Misdemeanor Justice Natapoff, Alexandra	~	1
2249	Trial Advocacy Workshop Sullivan, Ronald	~	3
	Fall 2023 Total Credits:		12

Fall 2023 - Winter 2024 Term: August 30 - January 19

2261	Criminal Justice Institute: Defense Theory and Practice Umunna, Dehlia	~	4
	Fall 2023 - Winter 2024 Total Credits:		4

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	Winter 2024 - Spring 2024 Term: January 02 - May 10		
8002	Criminal Justice Institute: Criminal Defense Clinic Umunna, Dehlia	~	6
	Winter 2024 - Spring 2024 Total Credits:		6
	Spring 2024 Term: January 22 - May 10		
2000	Administrative Law Block, Sharon	~	4
2169	Legal Profession Gordon-Reed, Annette	~	3
	Spring 2024 Total Credits:		7
	Total 2023-2024 Credits:		29
	Total JD Program Credits:		98

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 07, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing this letter in support of the application of Elliot Caron-Vera, Harvard Law School J.D. expected 2024, to serve as your law clerk.

I came to know Elliot this past Spring semester, when he was a student in my Federal Courts class. In the Federal Courts class, he always seemed well-prepared. More significantly, he often asked terrific (and non-obvious) questions, on which I would reflect and to which I would then return in a subsequent class; this happened at least three or four times during the semester. Federal Courts grades were determined primarily on the basis of a blind-graded exam; he wrote an excellent exam and earned the grade of Honors. He provided a truly praiseworthy analysis of one of the most difficult questions, which involved the well-pleaded complaint rule and "arising under" jurisdiction over an attempted removal of a state court action for a declaratory judgment; his answer was logically organized, concise, and easy to follow as it worked its way through the complex issues presented in applying the Supreme Court's decision in Franchise Tax Board v. Construction Laborers Vacation Trust. His exam as a whole reflected an excellent grasp of the Federal Courts issues we studied.

Each student in the Federal Courts class was also required to write a "thought piece" on one of several scholarly essays we read about the assigned cases. He was assigned to write in response to Professor Lauren Robel's essay on Railroad Comm'n of Texas v. Pullman Co. After clearly and accurately summarizing the holding and reasoning in the case, Elliot developed the quite interesting claim that this was a "strange variant of the doctrine of constitutional avoidance," which he described as more usually resting on separation of powers concerns that lead courts to avoid invalidating statutes if there is a constitutionality-saving construction open. In Pullman, Elliot notes, federalism considerations seem to underlie the judicial self-restraint, but do so in a way that, he suggests, is inconsistent with the idea that fundamental changes to the federal system had been enacted by the Reconstruction Congress, whose "'very purpose was to interpose the federal courts between the States and the people, as guardians of the people's federal rights'" (citing and quoting Mitchum v. Foster). Elliot was also critical of the degree of discretion built into the Pullman doctrine, both on whether "sensitive" state policies were involved and whether state law was sufficiently indeterminate to warrant abstention in deciding the federal constitutional issue until the state law issues were resolved. He concludes that Pullman should best be seen as a reaction to the specific facts in the case, decided during the Jim Crow era.

Elliot's academic performance at HLS more generally has been good. As of this writing, with four semesters of grades reflected on his transcript, a solid majority of his grades are Honors and in his most recent semester, Spring 2023, he earned straight Honors in all his classes. He has achieved this fine record while also working on two different journals and serving as a research assistant to another professor.

As I came to know him in this class (both through in-class discussion and through discussion in my office hours), Elliot is someone with a very active and inquiring mind; he critically examines the materials under consideration. He is both personable and interesting to talk with. Many of his work experiences before and during law school have involved exposure to direct representation of indigent persons in a variety of settings; he seems quite devoted to doing public interest work as a lawyer. Unusually for Harvard Law students, Elliot describes himself as paying his way through his undergraduate degree, relying on "need-based financial aid and working long hours in minimum wage jobs"; he worked as a "grocery store clerk, restaurant host, garbage collector, producer's assistant, and barista," among other jobs. He characterizes himself as having a very strong work ethic; his background in Philosophy and Literature made him a "careful reader and a disciplined analytical thinker," who is "enthusiastic about pursuing difficult research questions." Since becoming a law student, he explains, he has "continued to work long hours, push myself to learn, and pursue opportunities in public interest legal work." He finds that he enjoys "the challenge of resolving complex legal issues" in clear writing.

I am happy to recommend this talented and interesting student to you. Should you have any questions, please don't hesitate to let me know. The best way to reach me is by email, vjackson@law.harvard.edu, to set up a time to talk. I hope this letter is helpful.

Sincerely,

Vicki C. Jackson
[signed June 6, 2023]

May 31, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write on behalf of Julio Colby, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. I recommend Mr. Colby highly. He has been a student in two of my courses, and he is a contributor to the blog I edit. In each of these settings, Mr. Colby has performed extremely well. He also has an impressive commitment to using law in the service of the public. I have no doubt that Mr. Colby will make an outstanding law clerk.

I first met Mr. Colby when he was a student in my 1L reading group, The Struggle for Workers' Rights on Film. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Mr. Colby stood out in the course for his ability to offer insightful comments about the themes of the movies we were discussing while also bringing to bear his personal and political commitments in a productive way. Mr. Colby's manner of intervention was also notable: he speaks respectfully, thoughtfully, while also making strong arguments that routinely persuaded his classmates.

During the Spring 2022 semester, Mr. Colby was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Mr. Colby took Labor Law there were approximately 90 students in the class, and Mr. Colby was among the strongest. His exam was excellent, earning him an H grade for the course. On each of the exams' three questions, Mr. Colby displayed a strong command of the doctrinal material in the course as well as the more theoretical material. Mr. Colby also was an important contributor to class discussions throughout the semester. He was completely prepared for every class session and answered all the questions I put to him with depth and accuracy. I remember in particular his answers to my questions about American National Insurance Company, a case regarding management functions clauses.

Based on Mr. Colby's performance in my courses, I have asked him to work as a student contributor for OnLabor.org, a labor law blog that I edit. As a contributor, Mr. Colby writes the News & Commentary feature approximately once every two weeks, a task that involves consolidating large amounts of material into short pieces of writing that are clear, accurate and accessible. Doing this work successfully requires both clarity of thinking and strong writing skills –both which Mr. Colby possesses. Mr. Colby's posts are uniformly accurate and extremely well written. He is an exemplary contributor to the blog.

I also have had the privilege of supervising Mr. Colby's "Recent Thing" for the Harvard Law Review, which he wrote on California's new sectoral labor law, the FAST Act. The questions raised by the FAST Act, including whether and why the legislation is preempted by federal labor law, are both complicated and of the utmost importance. Mr. Colby's piece represents one of the first sustained legal treatments of these questions, and it is a model of clarity and persuasive argument.

Finally, I have had the opportunity to get to know Mr. Colby through his service as a student fellow for the Law and Social Change Program of Study (of which I am faculty director). In this capacity, Mr. Colby has taken responsibility for organizing a number of student events designed to encourage interested participants to pursue careers in social change work. He is terrifically well-organized, hard-working and an excellent leader among his peers. Mr. Colby is a pleasure to know and work with. He combines all of this intellectual talent with a humility that can be all too rare among law students. This combination of traits will make Mr. Colby a successful lawyer and a marvelous colleague. I have no doubt that they will also make him a terrific law clerk and a welcome addition to any chambers.

Thank you for your attention to Mr. Colby's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

Benjamin Sachs - bsachs@law.harvard.edu - 617-384-5984

Elliot Caron-Vera

113 Hampshire St. 2R, Cambridge, Massachusetts 02139
413.320.9687 · ecaronvera@jd24.law.harvard.edu

WRITING SAMPLE

Drafted Spring 2023.

Used with permission from Harvard Prison Legal Assistance Project.

Names have been changed to protect confidentiality.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Mass. R. Civ. P. 12(c), Plaintiff moves for judgment on the pleadings in this matter. Defendant found Plaintiff guilty of attempting to introduce contraband into a prison facility in the absence of any evidence indicating that Plaintiff had knowledge of the attempt. Even when construed in a light most favorable to Defendant, the facts on the record require that this guilty finding be overturned.

BACKGROUND

Plaintiff Malcolm Smith is incarcerated at Souza-Baranowski Correctional Center ("SBCC"), a maximum-security prison operated by the Defendant Massachusetts Department of Correction ("DOC").

On July 17, 2021, Correctional Officer Bryan Weber ("Officer Weber") delivered a piece of legal mail to Mr. Smith. Administrative Record ("AR") 1. Officer Weber had Mr. Smith sign his name in a log book to acknowledge receipt of the mail. AR 72. The envelope was addressed to "MALCOLN SMITH" (sic) and was stamped with the notice that it was "LEGAL MAIL." AR 62. The contents of the envelope consisted of a one-page letter purportedly addressed to Mr. Smith by an attorney. AR 1.

While inspecting the contents of the mail, Officer Weber "observed that it was off-white in color and had a waxy texture." *Id*. Officer Weber took photos of the mail, and brought it to the Inner Perimeter Security office (IPS) for testing. AR 22. IPS officers then tested the letter using a NARK II field test. The test yielded a positive result for the presence of synthetic cannabinoids. *Id*. That day, Disciplinary Report No. 476783 was written, alleging nine offenses. The report did not allege that there was any evidence that Mr. Smith requested or solicited the item of mail, or that he had requested or solicited drugs. AR 1-2.

Mr. Smith was escorted to a non-contact area, where he was strip searched and informed that the mail had tested positive for synthetic cannabinoids. AR 40. No contraband was found when DOC executed the strip search. AR 22. A urine test also returned negative results. AR 22. Mr. Smith agreed to an interview with IPS officers Weber and Schmidt, during which he stated that he had no knowledge of the attempt to introduce contraband into SBCC. DOC then returned Mr. Smith to the K2 unit on "no status." AR 43.

Subsequent investigation produced no evidence linking Mr. Smith to the seized mail. When officers searched his cell, "[n]o evidence was recovered showing that [Mr. Smith] had knowledge of the suspicious contents." AR 22-23. Throughout the course of its investigation, IPS officers collected photographs, drug lab results, and phone and email records, and produced a report summarizing all investigative findings. According to DOC, "no evidence of [Mr. Smith's] direct involvement in planning or soliciting the introduction of drugs was detected during the investigation." AR 23.

On August 5, 2021, the mail was delivered to the University of Massachusetts Medical School Drugs of Abuse Laboratory in Worcester, Massachusetts for further testing. AR 42. The test reportedly detected the presence of synthetic cannabinoids. As a result of the laboratory's report, Mr. Smith was placed in restrictive housing on September 3, 2021. *Id.* After spending seven days in restrictive housing, Mr. Smith was transferred to the Northside of SBCC for six months, where he was denied access to rehabilitative programming and lost the opportunity to earn good-time credits. AR 90, 115.

On December 20, 2021, Joel H. Thompson of the Harvard Prison Legal Assistance Project entered appearance on behalf of Mr. Smith. AR 73. On February 2, 2022, Mr. Smith requested discovery through his student attorney. AR 74. Nine weeks later, on April, 7, 2022, the

Department produced discovery. The Department took an additional four weeks to schedule the hearing.[1] Officer Weber was out of work between December 2021 and March 2022, which he acknowledged "may have contributed to [the] delay." AR 22.

A disciplinary hearing took place on May 3, 2022, before a DOC disciplinary hearing officer ("DHO"). AR 19. At the hearing, Mr. Smith testified that he did not request that any drugs be sent to him and stated that he was not given an opportunity to view or inspect the envelope before signing the log book. AR 109. Accordingly, he never suspected that the letter was not legitimate legal mail. AR 110.

DOC presented Officer Weber as a witness. AR 21. Officer Weber confirmed that he had Mr. Smith sign the log book before the mail was opened and inspected, and testified that it is standard for IPS to inspect the mail before physically distributing it to the recipient. AR 97-98. Prior to signing the log book, Officer Weber testified, Mr. Smith was merely shown an envelope and told that he had received mail from an attorney with whom he had a pre-existing attorney-client relationship. AR 92, 98.[2] "[S]o far as the contents of the envelope," Officer Weber confirmed, "he did not see that." AR 98.[3] Officer Weber opined that Mr. Smith "could have had a role" in the incident, but acknowledged that "there [was] not much evidence supporting that" theory. AR 104. "Besides him accepting the mail," Officer Weber concluded, there was "absolutely nothing" connecting Mr. Smith to the contraband. AR 104.

[1] Departmental regulations governing disciplinary hearings mandate a speedy and efficient process. *See* 103 C.M.R. 430.11(3) (Disciplinary hearings must be scheduled "within a reasonable time").

[2] Only two weeks prior to the incident, Mr. Smith had received a letter from the same attorney that DOC deemed not suspicious. AR 100.

[3] Only the contents of the mail ultimately tested positive for synthetic cannabinoids. AR 107. The envelope itself was deemed "not suspicious in nature" by DOC and was never tested. AR 108.

On May 23, 2022 the DHO issued a written decision. AR 27.[4] Taking into consideration the possibility that Mr. Smith did not actually solicit the legal mail or its contents, the DHO summarized his reasoning as follows:

> DHO considered the defense that the introduction of illicit substances is a common scheme used by inmates through the use of uninvolved and unwitting individuals' names in order to avoid the true solicitors being detected … DHO finds that while there is no evidence directly linking Smith to the planning of the introduction, there also is no evidence for consideration linking any individual other than Smith to the letter and contents. AR 24-25.

The fact that the letter was addressed to Mr. Smith, the DHO reasoned, was "suitable evidence that SMITH was the intended recipient of the envelope and its contents." AR 25. Further, because Mr. Smith had "received and accepted" the mail, the DHO reasoned, his intent had been established. AR 24. On that basis, the DHO found Mr. Smith guilty of "attempting or aiding another person to introduce unauthorized drugs," dismissing the remaining charges. AR 25.

As a direct result of the DHO's decision, Mr. Smith was charged $194 in "restitution" costs, which included costs for the laboratory testing. AR 17. In addition, Mr. Smith lost 120 days of canteen privileges. AR 17.

On June 6, 2022, Mr. Smith filed an appeal to the superintendent of SBCC pursuant to 103 C.M.R. § 430.18(1). AR 8. The appeal was denied. AR 5. On August 31, 2022, Mr. Smith initiated the instant action. *See generally* Complaint.

ARGUMENT

I. LEGAL STANDARD.

[4] The disciplinary regulations require hearing officers to issue their decision within five business days of the close of the hearing. 103 C.M.R. 430.17(1). The decision in this case was issued after three weeks. AR 27. Whereas 103 C.M.R. 430.23 holds that a waiver of procedural time limits must be supported by "good cause," the DHO explained his decision to waive time limits as follows: "Service of Hearing Results." AR 27.

This Court has jurisdiction pursuant to G.L. c. 249 § 4. "A civil action in the nature of certiorari under G.L. c. 249, § 4, is to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings affecting their justiciable rights when no other means of relief are open." *Seales v. Boston Hous. Auth.*, 88 Mass. App. Ct. 643, 648 (2015) (internal quotation omitted). Prison disciplinary hearings are reviewable in court through the certiorari process. *Pidge v. Superintendent*, 32 Mass. App. Ct. 14, 17 (1992) ("Inmates challenging alleged improprieties in prison disciplinary proceedings under State law must proceed by way of an action in the nature of certiorari"). In a challenge to the result of a prison disciplinary hearing, the reviewing court examines "whether the record contains substantial evidence in support of the hearing officer's decision." *Puleio v. Comm'r of Correction*, 52 Mass. App. Ct. 302, 305 (2001); *Cepulonis v. Comm'r of Correction*, 15 Mass. App. Ct. 584, 587 (2002) (disciplinary findings must be "supported by reliable evidence on the record as a whole.").

Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion … taking into account whatever in the record fairly detracts from the weight of the evidence." *Jordan v. Superintendent, Massachusetts Corr. Inst., Cedar Junction*, 53 Mass. App. Ct. 584, 587 (2002). While the court may not substitute its judgment for that of the agency and displace a finding that is a "choice between two conflicting views," *id*., where "evidence is so limited and problematic" that it does not substantially support the decision, a court need not defer to the agency. *Id*. at 589-90. Indeed, "[t]he principle of according weight to an agency's discretion… is one of deference, not abdication." *NSTAR Elec. Co. v. Dept. of Pub. Utils*., 462 Mass. 381, 387 (2012) (*citing Moot v. Dep't of Envtl. Prot.*, 448 Mass. 340 (2007)) (internal quotations omitted).

II. THE EVIDENCE IN THE RECORD WAS INSUFFICIENT TO SUPPORT A FINDING THAT MR. SMITH INTENDED TO INTRODUCE CONTRABAND INTO THE PRISON.

The evidence on the record is inadequate to support the DHO's conclusion that Mr. Smith's mere receipt of mail established by a preponderance of the evidence that he had "attempted" to introduce contraband into SBCC. *See* 103 C.M.R. 430.16(1). The DHO's decision was based solely on three facts: (1) the item of mail in question was addressed to Mr. Smith, (2) Mr. Smith signed a log-book when the reporting officer delivered the mail, and (3) there was no evidence on the record linking any individual other than Mr. Smith to the incident. Standing alone, these facts do not reasonably support an inference that Mr. Smith himself attempted to introduce contraband into the prison.

The mere fact that a piece of mail addressed to Mr. Smith tested positive for synthetic cannabinoids cannot itself establish by a preponderance of the evidence that he intended to introduce a controlled substance into the prison. *See Arone v. Comm'r of Dep't Social Servs*., 43 Mass. App. Ct. 33, 34 (1997) ("That the record contains evidence from which a rational mind might draw an inference in support of an agency conclusion does not dispose the reviewing court's inquiry"). Mr. Smith's name, commitment number, and address are all publicly available information. The DOC is doubtless aware that, in order to evade detection, incarcerated people sometimes attempt to introduce contraband into prison facilities by addressing mail to unwitting recipients.[5] The mere fact that a letter was addressed to Mr. Smith does not, therefore, indicate his knowledge of the mail or an intent to obtain it. Moreover, even if the DHO doubted the veracity of Mr. Smith's testimony, "disbelief of the prisoner's testimony would not, without more, constitute substantial evidence of the plaintiff's knowledge." *Alves v. Superintendent*, 54

[5] Indeed, Officer Weber himself testified that mail is sometimes sent to unwitting recipients without their knowledge in order to smuggle contraband into prison facilities. AR 105.

Mass. App. Ct. 1110, at *2 (2002) (overturning a prison disciplinary finding where the hearing officer relied solely on the fact that a confiscated item of mail was addressed to the accused). In *Jordan v. Superintendent*, the Appeals Court overturned the results of another disciplinary hearing in which the mere receipt of an item of contraband was found sufficient to support an inference of intent. 53 Mass. App. Ct. 584 (2002). The *Jordan* court reasoned that, where the DHO could not "conclude that the plaintiff intended to receive [contraband] or even that he knew he had received it," a guilty finding was unfounded. *Id.* at 589. The same result is appropriate in this case, where, as in *Jordan*, "the evidence is so limited and problematic that the prison officials themselves could not, even based on their knowledge of the inmates and the institution and the attendant facts and circumstances, find that the plaintiff had knowledge." *Id*. at 589-590.

While the record does substantiate a finding that an unidentified individual outside the prison intended to introduce contraband into the facility, Mr. Smith's intent cannot be inferred from that fact alone. *See Blake v. Mass. Dep't of Corr.*, No. 2012-1372, 2014 Mass. Super. LEXIS 208 (2014). This Court's decision in *Blake* is instructive. In that case, an individual visited Benjamin Blake at MCI-Shirley. When DOC officials searched the visitor's purse, which she had placed in a locker on site, they discovered marijuana. A subsequent strip-search of Blake produced no evidence. Citing to the "zero-tolerance policy for drug possession" at MCI-Shirley, the hearing officer found Mr. Blake guilty of attempting to introduce drugs into the prison, concluding that "the fact [the visitor] possessed marijuana upon entering MCI-Shirley established intent." *Id*. at *10. From that finding, the hearing officer concluded that Mr. Blake's intent could be assumed. The Court rejected this reasoning: "[Blake's] intent to introduce marijuana into MCI-Shirley cannot be inferred from the fact" that the visitor had brought marijuana in her purse. *Id*. at *11. Similarly, the fact that an unknown individual addressed an

item of mail containing contraband to Mr. Smith does not itself show that Mr. Smith solicited the mail or its contents. In *Blake*, the Court found that an analogous inference could not support a guilty finding, despite the presence of other circumstantial evidence on the record.[6] The record on which Mr. Smith was found guilty contained no circumstantial evidence indicating his alleged intent to receive the mail.

The DHO could only have based the guilty finding, then, on the fact that Mr. Smith "accepted" the letter by signing a log-book when the mail was delivered. That Mr. Smith "accepted" the letter, however, does not constitute an admission to the offense. Mr. Smith testified that he did not have an opportunity to physically inspect the envelope or its contents before signing the log-book. AR 109. The reporting officer did not dispute that testimony. AR 98. Indeed, Officer Weber suggested only that he may have shown Mr. Smith the envelope before Mr. Smith signed the log book. AR 97. As Officer Weber emphasized elsewhere in his testimony, however, the envelope itself was later deemed "not suspicious in nature" by DOC. AR 108.Where an item of mail is accepted without any opportunity for inspection, the bare fact of receipt says nothing about an individual's knowledge of the contents of the delivery.[7] There is no basis, therefore, on which the DHO could determine that Mr. Smith knowingly received contraband. *See Kunkel v. Alger*, 10 Mass. App. Ct. 76, 86 (1980) ("It is settled that mere disbelief of testimony does not constitute evidence to the contrary"); *see also NSTAR Elec.* Co., 462 Mass. at 392 (disbelief in witness testimony does not constitute "affirmative substantial

[6] Other evidence on the record found insufficient to satisfy the "substantial evidence" standard included information from a confidential informant and evidence that Blake had been visited before by the same person.

[7] In other recent prison disciplinary proceedings, DOC has itself recognized that a guilty finding is not appropriate where the only evidence linking the accused to the contraband is the fact that he "accepted" an item of mail by signing the log-book. *See* AR 29-30. One such opinion is included in the record. *See* Disciplinary Hearing No. 478477, AR 30. *Id*. The logic of Disciplinary Hearing No. 478477 was rejected by the DHO without any explanation of how it differed from the instant case.

evidence in support of the department's ultimate finding"). More fundamentally, there is nothing suspicious about a decision to accept a letter from an attorney. In fact, the DHO's arbitrary finding of guilt discourages all incarcerated clients from accepting legal mail, under the rational fear that they, like Mr. Smith, could be improperly accused and punished. This interference with attorney-client communications is both unnecessary and untenable.[8]

Finally, to the extent that the DHO's decision relied on the absence of evidence linking any individual other than Mr. Smith to the incident, he impermissibly shifted the burden of proof. *See* 103 C.M.R. 430.16 ("The proponent(s) of the disciplinary report shall have the burden of proving the offense(s) by a preponderance of the evidence"). That a defendant in a prison disciplinary hearing "failed to present persuasive evidence of innocence does not satisfy DOC's burden of proving guilt." *Blake*, at *14. Mr. Smith had no obligation to uncover an alternate suspect or theory explaining the incident.[9] In effect, the DHO shifted the burden to Mr. Smith to prove his innocence. In so doing, he violated 103 C.M.R. 430.16. The absence of any evidence linking an individual other than Mr. Smith to the contraband, therefore, does not constitute an adequate basis to support the DHO's decision.

An arbitrary and unfounded finding of guilt against the addressee of fraudulent legal mail does not advance prison security. On the contrary, a guilty disciplinary finding based on such minimal proof undermines the intended deterrent effect of disciplinary sanctions. As the

[8] 103 C.M.R. § 481.11(4) permits facilities to implement an Attorney Verification System ("AVS") to prevent fraudulent privileged mail from entering DOC facilities." Under that system, the risk that incarcerated clients could unknowingly receive fraudulent legal mail would be mitigated. SBCC has failed to implement an Attorney Verification System.

[9] It is worth noting that the DOC has extensive investigative capabilities; the arrival at the prison gate of mail containing drugs is only the beginning of an investigation. In this case, DOC officials relied on a strip search, cell search, interrogation, phone and email records, and produced an IPS report summarizing all investigative findings. "[N]o evidence of [Mr. Smith's] direct involvement in planning or soliciting the introduction of drugs was detected during the investigation." AR 23. Where no evidence is uncovered by extensive investigative efforts, the addressee of an item of mail should not be punished merely because another person wrote his name on an envelope.

Supreme Judicial Court has noted elsewhere, arbitrary treatment denies prisoners "a meaningful incentive to modify [their] behavior and conform to prison regulations," which generally compromises prison security. *Haverty v. Comm'r of Corr*., 437 Mass. 737, 757 (2002) (citing *Hoffer v. Comm'r of Corr*., 412 Mass. 450 (1992)). Moreover, failure to reverse this guilty finding would enable bad actors to frame unwitting prisoners by having contraband mailed to them, knowing that receipt of that mail will result in a sanction regardless of the attendant circumstances. It is noteworthy that, under current Departmental policy, the "decision […] to accept privileged mail, standing alone, shall not constitute sufficient evidence that the inmate attempted to introduce contraband." *See* Exhibit 1, Department of Correction Standard Operating Procedure for Privileged Mail, Section VI. There is, therefore, no principled basis for upholding the DHO's finding of guilt. On the contrary, in the absence of substantial evidence supporting the inference that Mr. Smith intended to introduce contraband into the prison, the DHO's guilty finding must be overturned.

CONCLUSION

The evidence on the record is insufficient to support an inference that Mr. Smith intended to introduce contraband into the prison. The DHO's unsubstantiated finding of guilt therefore must be overturned.

Applicant Details

First Name	**David**
Middle Initial	**E**
Last Name	**Chardack**
Citizenship Status	**U. S. Citizen**
Email Address	**dec49@georgetown.edu**
Address	**Address** Street **127 Saint Felix Street Apt. 2** City **Brooklyn** State/Territory **New York** Zip **11217** Country **United States**
Contact Phone Number	**8014145474**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2016**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 18, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Olson, Steig
steigolson@quinnemanuel.com
212-849-7152
Klass, Gregory
gmk9@georgetown.edu
O'Sullivan, Julie
osullij1@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAVID CHARDACK
127 St. Felix Street, Apt. 2, Brooklyn, NY 11217 • (801) 414-5474 • dec49@georgetown.edu

June 11, 2023

The Honorable Beth Robinson
U.S. Court of Appeals for the Second Circuit
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

My name is David Chardack, and I am an associate at Quinn Emanuel Urquhart & Sullivan, LLP, and an incoming law clerk to U.S. District Judge Victor Marrero, of the Southern District of New York, for the 2023-2024 term. In 2021, I graduated *magna cum laude* from Georgetown University Law Center, where I served as an articles editor for *The Georgetown Law Journal*. I write to apply for any available clerkship in your chambers beginning fall 2024 or later.

In my two years of practice, I have litigated a range of complex commercial disputes involving securities fraud, contract, trademark, trade secret, false advertising, and civil RICO claims. I also maintain a pro bono practice in which I represent LGBTQ+ asylum-seekers facing removal proceedings in U.S. Immigration Court. Within the next several years, I hope and intend to return to service in government. I view a clerkship in your chambers as an unparalleled opportunity to gain experience working on matters of public interest that I encounter with little frequency in private practice. And simultaneously, I believe that my experience from private practice will be an asset to your chambers in handling the complex commercial matters on the Second Circuit docket.

For details on my qualifications, enclosed you will find a resume, transcript, and writing sample. Letters of recommendation are available via OSCAR from the following professors and practitioner:

- Gregory Klass, Associate Dean, Georgetown University Law Center
- Julie R. O'Sullivan, Professor, Georgetown University Law Center
- Steig Olson, Partner, Quinn Emanuel Urquhart & Sullivan, LLP

Additional references from supervisors in practice are available upon request. Please do not hesitate to contact me if I can provide any additional information, and thank you for your consideration.

Respectfully,

/s/ David Chardack

DAVID CHARDACK

127 Saint Felix Street, Unit 2, Brooklyn, NY 11217 • (801) 414-5474 • dec49@georgetown.edu

EDUCATION

Georgetown University Law Center, Washington, DC
Juris Doctor, *magna cum laude*, June 2021
GPA: 3.91
Honors: Order of the Coif (top 10% of graduating class)
CALI Award for Best Exam (Constitutional Law II – Prof. Randy Barnett)
CALI Award for Best Exam (Professional Responsibility)
Dean's List (2018-19 Academic Year; 2019 Fall Semester; 2020 Fall Semester)
Journal: *The Georgetown Law Journal*, Vol. 109, Articles Editor
Activities: Housing Advocacy and Litigation Clinic, Fall 2020
Law Fellow (teaching assistant for first-year legal writing class), 2019-20 Academic Year
OutLaw (LGBTQ+ affinity group) Academic & Career Chair, 2019-20 Academic Year

Georgetown University, Washington, DC
Bachelor of Arts, cum laude, in Honors Philosophy, May 2016

EMPLOYMENT

Hon. Victor Marrero, Southern District of New York, New York, NY
Law Clerk, Oct. 2023 – Oct. 2024

Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY
Summer Associate, Jun. 2020 – Aug. 2020; *Associate*, Oct. 2021 – present
- Conduct factual investigations, assess claims, and draft complaints in high-stakes commercial disputes, including disputes related to securities fraud, commercial insurance liability, and corporate acquisitions.
- Research and draft briefing in case-dispositive motions for civil RICO, securities fraud, and contract actions.
- Collaborate with expert witnesses to develop technical expert reports in trademark and trade secret cases.
- Chaired trial team and obtained jury verdict for plaintiff in Summer Associate Trial Advocacy Program.

Hon. Valerie E. Caproni, Southern District of New York, New York, NY
Judicial Intern, Jun. 2019 – Aug. 2019
- Drafted judicial opinions, assembled research outlines, and conducted legal research on federal- and state-law disputes involving employment discrimination, federal jurisdiction, defamation, and product liability.

New York County District Attorney's Office, New York, NY
Paralegal, Aug. 2016 – Jun. 2018
- Supported five attorneys with general felony investigations by analyzing evidence, preparing trial exhibits, maintaining contact with government witnesses, and testifying at trial and grand jury proceedings.
- Managed logistic aspects of antiquities trafficking investigation, including organization of evidence, inventory of seized artifacts, and contact with foreign consular officials to repatriate artifacts.

Public Defender Service for the District of Columbia, Washington, DC
Intern Investigator, Feb. 2016 – July 2016
- Canvassed for witnesses at crime scenes and took statements from government and defense witnesses.
- Visited clients in jail to provide case updates and consult on trial and investigation strategy.

Maryland Office of the Public Defender, Hyattsville, MD
Intern Investigator, May 2015 – Aug. 2015
- Documented crime scenes, collected witness statements, subpoenaed trial witnesses, and testified at trial for defendants in Prince George's County accused of misdemeanors including loitering, DUI, and assault.

CREDENTIALS AND PERSONAL INTERESTS

- Bar admissions: New York State, S.D.N.Y., E.D.N.Y., U.S. Executive Office of Immigration Review.
- Interests: playing classical piano; learning languages; distance running; reading novels and narrative nonfiction.

Record of: David Edmund Chardack
GUID: 803669904

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law
Honors: Magna Cum Laude
Awards: Order of the Coif
Bachelor of Arts May 21, 2016
Georgetown College
Major: Philosophy
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	94	Civil Procedure Charles Abernathy	4.00	A	16.00	
LAWJ	002	41	Contracts Gregory Klass	4.00	A	16.00	
LAWJ	005	41	Legal Practice: Writing and Analysis Diana Donahoe	2.00	IP	0.00	
LAWJ	008	94	Torts Girardeau Spann	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	48.00	4.00
Cumulative	12.00	12.00	48.00	4.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	003	42	Criminal Justice Rosa Brooks	4.00	A-	14.68	
LAWJ	004	94	Con Law I: Federal System Yvonne Tew	3.00	B+	9.99	
LAWJ	005	41	Legal Practice: Writing and Analysis Diana Donahoe	4.00	A-	14.68	
LAWJ	007	94	Property Neel Sukhatme	4.00	A	16.00	
LAWJ	235	50	International Law I: Introduction to International Law David Koplow	3.00	A	12.00	
LAWJ	611	03	Internal Investigation Simulation: Evaluating Corporate Corruption Michael Cedrone	1.00	P	0.00	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	67.35	3.74
Annual	31.00	30.00	115.35	3.85
Cumulative	31.00	30.00	115.35	3.85

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	126	07	Criminal Law John Hasnas	3.00	A	12.00	
LAWJ	165	09	Evidence Michael Pardo	4.00	A	16.00	
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems Kevin Arlyck	2.00	A	8.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A+	16.00	
LAWJ	536	23	Legal Writing Seminar: Theory and Practice for Law Fellows Sonya Bonneau	2.00	A	8.00	

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.00	4.00
Cumulative	46.00	45.00	175.35	3.90

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	110	97	Copyright Law Jonathan Band	3.00	P	0.00	
LAWJ	121	09	Corporations Donald Langevoort	4.00	P	0.00	
LAWJ	1454	08	Topics in LGBT Civil Rights Seminar Paul Smith	2.00	P	0.00	
LAWJ	178	05	Federal Courts and the Federal System David Vladeck	3.00	P	0.00	
LAWJ	536	23	Legal Writing Seminar: Theory and Practice for Law Fellows Sonya Bonneau	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	15.00	0.00	0.00	0.00
Annual	30.00	15.00	60.00	4.00
Cumulative	61.00	45.00	175.35	3.90

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: David Edmund Chardack
GUID: 803669904

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues	2.00	A	8.00	
	Irving Gornstein						
LAWJ	361	09	Professional Responsibility	2.00	A+	8.66	
	Philip Sechler						
LAWJ	545	08	Financial Restructuring and Bankruptcy	4.00	A	16.00	
	Adam Levitin						
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division		NG		
	Paul diBlasi						
LAWJ	552	80	~Seminar	2.00	A	8.00	
	Paul diBlasi						
LAWJ	552	81	~Casework	3.00	A	12.00	
	Paul diBlasi						
LAWJ	552	82	~Professionalism	2.00	A-	7.34	
	Paul diBlasi						

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.00	4.00
Cumulative	76.00	60.00	235.35	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1626	05	Internet Law	2.00	P	0.00	
	Anupam Chander						
LAWJ	1737	05	Entertainment Disputes	2.00	P	0.00	
	Douglas Emhoff						
LAWJ	372	09	Music Law Seminar: Changing Landscapes in the Music Industry and the Law that Governs It	2.00	A	8.00	
	Julia Ross						
LAWJ	396	05	Securities Regulation	4.00	A-	14.68	
	Donald Langevoort						
LAWJ	455	01	Federal White Collar Crime	4.00	A	16.00	
	Julie O'Sullivan						

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	10.00	38.68	3.87
Annual	29.00	25.00	98.68	3.95
Cumulative	90.00	70.00	274.03	3.91

End of Juris Doctor Record

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WRITER'S DIRECT DIAL NO.
(212) 849-7152

WRITER'S INTERNET ADDRESS
steigolson@quinnemanuel.com

April 11, 2023

Recipient: lawclerkships@georgetown.edu

Re: Letter of Recommendation for David Chardack

Dear Judge,

I write to recommend David Chardack for a circuit court clerkship enthusiastically and without hesitation. I am a partner at Quinn Emanuel who focuses on antitrust litigation, working for both plaintiffs and defendants. After law school, I clerked on the U.S. District Court for the Northern District of California and then the United States Court of Appeals 2nd Circuit. I have a good understanding of what it takes to be a valuable clerk. Based on working very closely with David here at Quinn Emanuel since October 2021, I am confident that he would be a welcome addition to any chambers. David is very smart and capable, a strong researcher and writer, and a hard worker. And, in addition to all of his legal skills, David is truly a pleasure to work with, and brings a positive attitude and a great demeanor to any team he is on.

My antitrust cases are often intellectually challenging and involve complex economic and legal issues. I am constantly on the lookout for young attorneys who are not intimidated by jumping into such cases, and for people who are willing to speak up and contribute right away. That type of person is not easy to find. David has been that type of person from the day he joined the firm right out of law school. He has quickly played a key role on several complex cases. David helped, for example, on a series of matters for a major client involving competition issues before a regulatory body. He had no prior experience, but dove in with a great attitude and quickly began to make substantive contributions. After we won a significant appeal before the D.C. Circuit Court of Appeals, with Kathleen Sullivan handling the argument, David helped apply the ruling in further briefing before the regulatory body.

David is also playing a key role in a hotly-contested case in federal court involving a series of claims and counterclaims regarding trade secret theft and antitrust issues. I have trusted David to work closely and directly with experts, and I feel no need to closely monitor him. He has also performed legal research and helped to draft briefs, as well as assisting with depositions. It is a hard and stressful case, but David always maintains a cool head and, as noted above, is a great team member. Everyone likes and respects David, and he is always willing to pitch in and help with whatever is needed.

In short, David is an exceptional young attorney, and I am confident he will be a great circuit court clerk.

Very truly yours,

Steig D. Olson

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to recommend in the highest terms David Chardack for a position in your chambers. David graduated in the top 10% of his class at Georgetown Law, served as the Articles Editor of the Georgetown Law Journal, served as a Law Fellow in our first-year legal writing program, and worked in the Housing and Advocacy Litigation Clinic. He is currently an associate at Quinn Emanuel. In addition to all these accomplishments, David is a thoughtful, kind person—one who not only can do law, but thinks about what it means and how it can be made better. I am certain that he will be an excellent clerk, and a pleasure to have in chambers for a year.

David was a student in my Contracts class his first semester at Georgetown Law. The class was relatively small, around 30 students, so I was able to get to know most of them individually. David was fully engaged with the materials and seemed to take learning them especially seriously. That's not to say he wasn't fun. My sense was that David was part of a tight-knit group of students in that class, who supported one another and formed strong bonds. David wrote an excellent exam—the second highest numerical score in an unusually strong group of students. Looking back at the details of how I scored him, I see that I gave him 100% of the available points for clarity and style on each of the three exam questions—which means that the exam was extraordinary well-written. When I award style points I look for clarity, structure and concision. David's exam exhibited all three. I'm not at all surprised that he was chosen as a Law Fellow—one of a group of high achieving students who work closely with our legal writing faculty to teach the first-year Legal Practice course. David simply gets the law, and he writes beautifully.

David did not take any courses from me after Contracts, but we have stayed in touch and I think I know him well. Before beginning at Georgetown Law, David spent two years as a paralegal at the New York City DA's office. If you interview him, you might consider asking about his experience in that office helping to start up an antiquities trafficking investigation. David has a natural curiosity, and what he learned about the international antiquities market, and how looted pieces ended up at places like Christies and the Met, is fascinating. David has told me that he enjoyed both the investigative work and participating in criminal litigation. His undergraduate degree from Georgetown is in philosophy. As a Jesuit school, the Georgetown Philosophy Department is especially strong in ethics, and David says he was drawn to the ethical dilemmas that played out in the criminal process. You'll see from his resume that David has a longstanding interest in the law. As an undergraduate, he worked as an intern investigator at both the DC Public Defender Service and the Maryland Office of the Public Defender. Although he is currently at Quinn Emanuel's New York offices last summer, his long-term interest is in public service, perhaps in a a US Attorney's or DA's office. He chose to work at Quinn Emanuel because the firm gives associates more responsibility than most, on the theory that it will help him prepare quickly for the next stage in his career.

David tells me that he grew up in Utah. I can't say for sure, but my sense is that coming to the East Coast for his undergraduate education might have been a transformative experience. David has the quiet confidence of someone who has made decisions in life about who he is and wants to be. Similarly, David does not strike me as a student who came to law school because he didn't know what else to do—merely as the default. He is a student who has decided what sort of person he wants to be, which includes being an excellent lawyer, and who is committed to becoming it.

David piled on a lot of experience in his time at Georgetown Law. He spent his first summer working as an intern in the chambers of Judge Caproni in the Southern District of New York—an experience he says he loved. As noted above, he took Georgetown's Housing Clinic. He took in Irv Gornstein and Judge Nina Pillard's Federal Practice seminar, writing an excellent paper on standing. Given that, plus the work that he's done in public defender offices and at the New York City DA's office, before law school and his work at Quinn Emanuel since, he will no doubt be a clerk who can hit the ground running. Given his prodigious intellect and wonderful writing skills, I am certain that he will be an excellent clerk. If you choose to interview him, he is likely to be someone you like personally as well.

Again, I recommend David very highly to you. Please do not hesitate to contact me if you have any questions.

Sincerely,

Gregory Klass

Gregory Klass - gmk9@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I have the great pleasure of offering a very enthusiastic letter of recommendation on behalf of David Chardack's application for a clerkship in your chambers. David and I shared a large and demanding class in Federal White-Collar Crime in the Spring 2021 semester. Based on his performance in class and in our many visits during office hours, I am confident that David will be a simply terrific clerk as well as a valued member of the chambers family.

Our shared Federal White-Collar Crime class was, unfortunately, conducted entirely on-line. I say "unfortunately" because the class is notoriously difficult even in normal circumstances. It provides a deep dive into a number of frequently charged federal statutes, including perjury, false statements and claims, fraud of all varieties, conspiracy, public corruption (§ 201, the Hobbs Act, and the Foreign Corrupt Practices Act), RICO, and money laundering. We also cover subjects such as mens rea, corporate criminal liability, the U.S. Sentencing Guidelines, grand jury practice, discovery, parallel proceedings, and the extraterritorial application of criminal statutes. As is evident, we cover a great deal of complex material. The difficulty was magnified for many students who struggled to maintain their focus at the end of a very challenging year of on-line learning. Not David. He was the stand-out in a large group of upper-class students. David wrote a terrific exam—he knew the subject-matter cold and showcased outstanding analytical abilities. His "A" was well-earned on a punishing curve, demonstrating his smarts, focus, commitment, and grit.

David graduated at the top of his class, with two nods for "best exams." He competed with hundreds of students to earn a spot on The Georgetown Law Journal, which students perceive to be our best, and thus is our most competitive, journal. David's experience as a law fellow (helping teach 1Ls Legal Practice), his work in the Housing Clinic, and his judicial internship with Hon. Valerie Caproni in the Southern District of New York prepared him well for his current position at Quinn Emanuel. David is quite satisfied with his varied litigation assignments at the firm because he has not yet settled on any particular area of specialization. That said, he has worked on two appeals and says that his favorite lawyerly activities are researching, thinking, and writing. (David recently told me, and I quote, "I am a writer.") It makes complete sense, then, that he would like to follow the clerkship he has already secured in with the Hon. Victor Marrero in the Southern District of New York with an appellate clerkship in your chambers. David certainly will be well positioned to be a credit to chambers from day one. I understand from my colleagues that David is a beautiful writer; I can attest to his work ethic, ability to synthesize large quantities of complex materials, and outstanding analytical abilities. I am confident, in short, that David will prove to be an invaluable clerk.

I know personal chemistry is hard to forecast, but I have found David to be an open, thoughtful, and interesting person—and someone I believe will be a very positive presence in chambers. In this regard, I know that many judges like to know a little more about the personality and backgrounds of applicants they are considering inviting into the chambers family and perhaps I can offer some information of value.

David tells me that he grew up a queer kid in a Catholic family in Salt Lake City. He remembers the campaign to amend Utah's constitution to ban same-sex marriage and similar initiatives hostile to his gay identity. David sent much of his childhood in unhappy isolation until, at 16, his parents sent him to boarding school, where he met other queer kids and started to come out. David is out to his parents but is still not out to his brothers and some of his cousins. He views it as a process that cannot be rushed.

That said, David has made it a professional priority to lift up and protect other queer people whenever he can. Throughout law school, and particularly as a 2L and 3L, David helped younger LGBTQ+ law students who needed guidance or just a friendly face. (I, in fact, referred a few 1Ls to David for mentoring.) David organized Georgetown's Outlaw student group's mentorship program as a 2L and did his best to coach Outlaw 1Ls through their end of summer job searches. In his first week at Quinn Emanuel, David brought in a gender non-conforming asylum seeker as a new pro bono client of the firm. He has been representing them in their removal proceedings and asylum application and generally helping them adjust to life as a New Yorker. David cites this as his most meaningful professional experience to date. And he sees this type of work as a central part of his practice and says that it always will be.

Obviously David is someone who is passionate about equal treatment under law, and who willingly undertakes to make a difference for other lawyers who are struggling as well as for clients. You will find him to be an honorable man, committed to public interest work as well as to professional excellence. It is important to note that while David is a serious guy, he is not too serious to have some fun. David studied classical piano with a brief foray into jazz. Because many of his friends were, and remain, musicians, he spends a fair amount of his time listening to live music. Many of his friends from classical studies have apparently evolved in their commitments because David reportedly spends a lot of time at New York's underground punk venues. David is also a runner, albeit a slow one. This is his way of sightseeing around New York City.

Julie O'Sullivan - osullij1@law.georgetown.edu

I think, in short, that you will find that David has the qualities of character necessary to a terrific clerk: native intellectual firepower, developed skills, an uncompromising work ethic, and a passionate commitment to the law and to equality. I recommend him to you enthusiastically, without reservation, and with confidence that he will be someone you will be proud to mentor in future.

Sincerely yours,

Julie R. O'Sullivan

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